No.

In The
Supreme Court of the United States

JOHN DOE I, JOHN DOE II, JOHN DOE III, on their own behalf and on behalf of the class -

Petitioners,

v.

THOMAS J. MILLER

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Iowa residency restriction for sex offenders violate the *ex post facto* prohibition as applied to people who committed their crime before the enactment of the statute in 2002?

2. Does the Iowa residency restriction on sex offenders violate the constitutional right to travel by essentially prohibiting most sex offenders from living in any towns greater than about 250 people?

3. Does the Iowa residency restriction on sex offenders violate the constitutional right to live with your immediate family by prohibiting offenders from moving into the homes of immediate family members?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. JOHN DOE I, II and III are the representative parties. The certified plaintiff class is the class of sex offenders currently living in the State of Iowa or who might wish to live in the State of Iowa who are subject to Iowa Code Section 692A.2A. Excluded from the class is anyone currently facing a criminal charge for violation of the Iowa statute.

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Hanson and Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 JOURNAL OF COUNSELING AND CLINICAL PSYCHOLOGY, No. 2, 348-362 19

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix at page 98a and is reported at *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

The opinion of the United States District Court for the Southern District of Iowa granting a permanent injunction appears in the Appendix at page 29a and is reported at *Doe v. Miller*, 98 F.Supp.2d 844 (S.D.Ia. 2004).

The opinion of the United States District Court granting preliminary relief appears at the Appendix at page 1a and is reported at, *Doe v. Miller*, 216 FRD 462 (S.D.Ia 2003).

The opinion of the United States Court of Appeals for the Eighth Circuit denying the Motion to Stay the Mandate appears in the Appendix at page 145a and is reported at *Doe v. Miller*, 418 F.3d 950 (8th Cir. 2005).

II. JURISDICTION

The United States Court of Appeals decided this case on April 29, 2005. A timely petition for rehearing was denied by the United States Court of Appeals on June 30, 2005. A copy of the order denying rehearing appears at Appendix p. 83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States District Court had jurisdiction under 28 U.S.C. § 1331 and 1343.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Iowa Code Section 692A.2A

Residency restrictions – child care facilities and schools.

1. For purposes of this section, *"person"* means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense or other relevant offense that involved a minor.

2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.

3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.

4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility, does not commit a violation of this section if any of the following apply:

1. The person is required to serve a sentence at a jail,

prison, juvenile facility, or other correctional institution or facility.

2. The person is subject to an order of commitment chapter 229A.
3. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
4. The person is a minor or a ward under a guardianship.

First Amendment to the United States Constitution:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 10 of the United States Constitution

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; Pass any Bill of

Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article IV, Section 2

The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.

IV. STATEMENT OF THE CASE

Proceedings Below

The Iowa Sex Offender Residency Restriction, Section 692A.2A, went into effect on July 1, 2002.

This civil rights class action suit was filed on June 24, 2003 by three John Does on behalf of the class of all sex offenders in the state of Iowa subject to the new legislation, § 692A.2A. After a hearing Judge Robert Pratt granted the temporary restraining order in addition to granting class certification of both plaintiff and defendant classes. Appx. 1a.

A final evidentiary hearing was held on December 15 and 16, 2003. The Court heard testimony about 17 sex offenders and experts from both sides. In addition plaintiffs presented maps showing the areas of different towns where class members could not live. On February 9, 2004, the District Court permanently enjoined the statute finding among other things that it violated the *ex post facto* clause, the right to travel and the right to live with one's family. Appx. 28a.

Defendant Thomas Miller, the Iowa Attorney General, appealed. On April 29, 2005, the Eighth Circuit reversed the injunction finding the statute constitutional. Judge Melloy dissented in part, concluding that the statute violated the *ex post facto* clause, as applied to those people who committed their crimes prior to the enactment date of the statute, July 1, 2002. Appx. p 98a.

The plaintiff class sought rehearing *en banc*. Five of the 11 judges on the Eighth Circuit would have granted rehearing *en banc*. Appx. p. 152a.

The Statute

The Sex Offender Residency Restriction, Section 692A.2A provides that sex offenders who committed their crimes against minors "shall not reside within 2,000 feet of the real property comprising a public or non-public elementary or secondary school or a childcare facility."

The statute creates exclusion zones around "child care" facilities and schools in the shape of circles with a radius of 2,000 feet. The definition of "child care facilities" includes not only registered daycare centers but also registered childcare homes.[1] There are a lot of circles.

The statute includes a limited grandfather clause. The restriction does not apply to any residence established prior to July 1, 2002. Offenders are allowed to continue to live where they were living as of the effective date of the statute.

There are no other exceptions whatsoever to the statute.

There is no time limit for how long the restriction lasts. While registration lasts in many cases for only ten years, the residency restriction is not so limited.

Factual Discussion

With the enactment of the Iowa Residency Restriction statute in 2002 something really bad happened. Most sex offenders were banished from towns of any size in Iowa.

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[1]In Iowa in order to establish a childcare home there is no fee and it is not necessary to have any children actually enrolled. In 2003 there were 7,000 "childcare facilities," of which close to 2,000 were new listings since the 2002 database. (Plaintiff's Exhibit 61).

Because of the limited grandfather clause it took a while for the effects to materialize. By December, 2003 when the evidentiary hearing was held, enough time had passed to understand what this statute does and how it effects the class and their families.

For a good understanding of what happens under the statute, it is necessary to consider three things. First there is the fact question of how much of the available housing in Iowa is eliminated by the statute. Second it is important to identify the people affected by the statute. Finally it is important to understand how those people are devastated by this statute.

The statute creates many, many circles within which sex offenders cannot live. On some level the analysis is simple. There are so many circles that there is nowhere for the class to live.

There is a clear pattern in Iowa after examining the many maps presented to the district court.

1. "In larger cities such as Des Moines and Iowa City, the maps show that the 2,000 foot circles cover virtually the entire city area. (See Plaintiff's Exhibit 9A, 11A.) The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods." District Court Finding, Appx. p. 39a. See maps of Des Moines (population 198,682)and the Waterloo-Cedar Falls (population 104,892) area. Appx. p. 156a-157a.

2. In midsize towns (for Iowa) with population of over 10,000 the pattern is the same. See maps of Mason City (population 29,172), Appx. p. 158a, and Carroll (population 10,106) Appx. pp. 155a.

3. In towns smaller than 10,000, but large enough for their to be a school or childcare facility, the entire town is off limits. Solon (population 1177) and Oxford (population 705) are examples. Appx. p. 159a.

4. With the very small towns, under 250 people, if there is no school or childcare facility there is no restriction. At the same time all it takes to entirely block off the town is for one person to register as a child care provider.

5. There is no restriction on houses in the country.

This pattern can be clearly seen by examining the town of Carroll, population around 10,000 and the surrounding Carroll County. A map of the town of Carroll and the statistics for Carroll County were presented at trial and appear along with the appropriate chart at pages 153a-154a of the Appendix. In Carroll County, 76% of the available housing units in the County are off limits. In the town of Carroll however, 98% of the housing units are off limits. In fact for the entire county, 98% of the housing units are off limits in towns greater in population than 200 people.

The statute makes that very large percentage of housing off limits. Sex offenders are left to find housing in the remaining areas, primarily the country. They can find housing assuming that housing is vacant and assuming that it is available to sex offenders. The testimony at trial was that when class members went to look at that small amount of housing that was left, there were often no vacancies, they could not afford the prices, or landlords would not rent to sex offenders.

The class consists of sex offenders of all types, as long as

their victims were under 18. There were around 5,000 such persons at the time of the hearing. Of the 17 persons whose situations were examined at trial, two were college students. One was retarded and on Social Security disability. Five were married. Four had children living in the home. Seven had been in prison. Ten had received probation. Five were still on probation or parole. Four owned their own home. Five had committed misdemeanors. Four had been evaluated as "low" risk to reoffend. Two were individuals who had committed their crimes in another state but lived in Iowa, had to register in Iowa and were therefore subject to the statute. In their cases, because of the fact that Iowa has a different age of consent for sexual activity, their behavior would not even have been criminal in Iowa.

The effect of the statute on these individuals has been real and has been compelling.

Some members actually experienced additional incarceration. John Doe II, IV, and XVIII were actually stuck in prison or in a halfway house because they could not find an "acceptable" place to live. They had been cleared for release. Before they can actually leave the facility housing must be approved. To be "approved" housing would have to be "legal". That is very difficult under the statute. In many cases the housing sought would be with immediate family. John Doe IV for example was released from prison after the injunction was imposed and went to live with his mother. Appx. pp. 43a-44a, 53a.

Some members are stuck in the house where they were living on July 1, 2002. This can be hard. John Doe VII is one of

the class members who committed an act that would not even have been illegal under Iowa law. In 2002 he was living in a two bedroom apartment with his wife and small child and mother-in-law. He could not move to a bigger place because of the law. In December 2003 his second child was born. His probation officer would not have objected to his moving to bigger house as long as the house was not right next to a high school. Appx. pp. 45a-46a.

Once class members moved from their July 1, 2002 residence they have experienced much difficulty. John Doe XIV and his wife testified. He had pled guilty to the serious misdemeanor in 1995 after exposing himself at a party where a 13 year old girl was present. He was 19. He is a low risk to reoffend. He completed probation. In the summer of 2002 his wife was expecting their second child. Not imagining that the new law applied to them, they moved to a house on a street with shade trees in Waterloo. They thought their daughter would love the house because it was near the elementary school playground around the corner. When he registered the new address with the sheriff on August 1, 2002 he was told he could not live there. He spent two months looking for a place to live in Waterloo. The only places "available" were in an exclusive and high priced neighborhood. They wound up buying a house in the country about 45 miles from Waterloo. He commutes an hour each day to work. In many ways his wife's testimony was even more compelling. She had to quit her job in Waterloo when they moved to the country. She now works two jobs, making less than she did in the city. They have left their family and friends in town. She has to drive 16 miles each day to the daycare center for her children. Appx. pp. 50a-51a.

John Doe X was convicted of a simple misdemeanor that was a sex offense. He completed probation. He and his wife both receive disability payments because of mental illness and retardation. To comply with the statute he and his wife moved to an apartment complex outside of town. This interferes significantly with the receipt of services. Appx. pp. 47a-48a; Exhibit K2.

John Doe XII was convicted of a misdemeanor and successfully completed probation. Before the residency restriction went into effect, he was going to college, living in a college dormitory, and getting good grades. He had a grant that covered the cost of room and board. At the time the restriction went into effect, he was living with his parents for the summer. He could not go back to the dorm in the fall because there was daycare center nearby. Since he could not move back to the dorm, he lost his grant for room and board. He had to commute back and forth from his parent's house. His commute was two hours per day. He was regarded as a low risk to re-offend. His probation officer allowed him to live in the dorm before the law went into effect. Appx. pp. 48a-49a.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The ability to choose where one wants to live, and to live if one chooses with one's closest relatives, are core aspects of personal liberty that most Americans take for granted. For all practical purposes, Section 692A.2A deprives convicted sex offenders in Iowa of those fundamental rights, even if they were convicted before the statute was enacted. It does so by a modern day form of banishment that merits this Court's plenary review. The need for review is especially true because numerous states have now either passed or are considering laws similar to Iowa's.

Residency restriction statutes for sex offenders, such as Iowa Code Section 692A.2A, are of relatively recent vintage. This new phenomenon seems to be contagious. The State of Alabama adopted its law in 2001. Iowa adopted § 692A.2A in 2002. By early 2004, when the district court published its opinion, there were 12 states with such restrictions. Since the district court opinion, Missouri, Indiana, Washington and Texas have all adopted residency restrictions.[2] The Michigan

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[2]Ind. Code Ann. §.11-13-3-4(g)(2) ("As a condition of parole, the parole board shall... prohibit the offender from residing within one thousand (1,000) feet of school property..."); Mo. Code Ann. § 566.147 ("Any person who has...been convicted of...[certain sexual crimes against minors] shall not establish residency within one thousand feet of any public school,... any private school,... or child care facility"); House Bill 1147, 2005 Wash. Session Laws, which went into effect on 7/24/05 (The Department may not approve a residence location if the residence is within a community protection zone. That is 880 feet from a public or private school.); Tex. C.C.P. Ann. § 42.12 (13B) ("If a judge grants community supervision to a

legislature just passed its restriction this month and it is waiting for the governor's signature at this time.[3]

There is every reason to believe that the number of jurisdictions with such statutes will increase substantially. One choice for sex offenders who are faced with the Iowa statute is to move to other states. To the extent that at the moment Wisconsin, Minnesota, South Dakota and Nebraska do not have such restrictions one can only imagine that they will enact them very soon if not this next legislative session. Indeed since September 1, 2005, when the District Court injunction in this case was dissolved, at least one town across the border from Iowa in Nebraska has adopted its own ordinance restricting where sex offenders can live. South Sioux City ordinance no. 2005-30.[4]

Of all the statutes around the country, Iowa, at 2,000 feet, is one of the most restrictive. To the extent that the Eighth Circuit has approved one of the most restrictive statutes, it follows that the statutes elsewhere in the country would be

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defendant... and the judge determines that a child... was the victim of the offense, the judge shall [require] that the defendant not...go in, on, or within 1,000 feet of a premises where children commonly gather...").

[3]See Enrolled Senate Bill No. 617; (An individual required to be registered shall not reside within a school safety zone, which is 1000 feet.)

[4]South Sioux City Ordinance 2005-30 prohibits all sex offenders from residing within 2000 feet of schools and day care centers. It also goes on to restrict residences within 2000 feet of school bus stops, playgrounds, parks or other places children congregate.

acceptable under Eighth Circuit analysis. Indeed Judge Colloton in his opinion noted that this choice on distance is the "sort of task for which the elected policy officials of the State....are properly suited." In the same sentence he observed that he would reach the same conclusion whether the limit was "across the street" or "500 feet or 3,000 feet." Appx. p. 122a.

Consideration of the case by the Supreme Court is necessary and appropriate in light of the potential conflicts between the states with regard to this matter. Now that Iowa has its 2,000 foot barriers approved, sex offenders in Iowa may decide to move across the state borders into South Dakota, Nebraska or Minnesota, jurisdictions which do not have as significant or any barriers on establishing a residence. This in turn will prompt those states[5] or perhaps even municipalities[6] in those states, to erect barriers to keep the sex offenders out. It should be

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[5]The Florida legislature is considering a law to increase the distance from 1000 feet to 2500 feet. Rep. Susan Goldstein, who introduced the bill said the ultimate goal is "to get these people out of our neighborhoods and hopefully out of our state". Jason Garcia, *Legislator seeks statewide law limiting where sex predators can live*, SOUTH FLORIDA SUN-SENTINEL, September 15, 2005, http://www.sun-sentinel.com/news/legislature/sfl-fpred15sep15,1,5133931.story.

[6]Orange Beach, Alabama, not satisfied with Alabama's 2000 foot restriction, has this month adopted an ordinance that bars sex offenders from living or working within four miles of schools, day cares, parks and public beaches. Ryan Dezember, *City tightens sex abuser restrictions*, MOBILE REGISTER, September 8, 2005, http://www.al.com/printer/printer.ssf?/base/news/1126171041410 70.xml&coll=3.

remembered that most class members are not on probation or parole. For that reason they are otherwise free to move throughout the United States. The barriers created by these statutes and the competition between states and municipalities to keep out sex offenders will result in sex offenders having no place to go at all, in any state.

The consequences of the statute remaining in effect are enormous. The district court found that this statute as a practical matter amounts to banishment. Sex offenders are banished from most towns in Iowa with populations greater than 250 people. They cannot live with their immediate family members if their family members have already established residences or own homes in those towns. If they become homeless they cannot in many cases even stay in homeless shelters. That would be prohibited if the shelters were within an exclusion zone.

There are several significant constitutional problems with these residency restrictions. The statutes are punitive creating problems under the *ex post facto* clause when applied to offenders who have already committed their crimes. There are also several fundamental rights that are implicated by this statute. Those particular constitutional protections, the right to travel and the right to live with one's immediate family, are discussed in later sections of this petition.

The statute was analyzed by the Eighth Circuit the same as if it had been a zoning regulation. Given the fundamental rights implicated and the punitive nature of the statute, such analysis was inappropriate and contrary to this court's rulings with regard to those fundamental rights. Analyzed with anything other than the most deferential rational basis, the statute will not survive.

There is no real reason for such draconian measures. The Iowa statute does not really make people safer. The State already has the authority to prosecute sex offenders for violating the law. The State has already greatly lengthened the sentences for these offenses. This Court has permitted states, such as Iowa, to initiate civil commitment proceedings against dangerous sex offenders as they finish their imprisonment.

But nothing in this Court's prior rulings authorizes what Iowa has done here. Indeed petitioners know of no other instance in modern American life in which a class of people have been declared *persona non grata* by communities across the country. The question of whether states may constitutionally banish convicted sex offenders presents a novel issue of national significance and scope. Certiorari is appropriate at this time and for this case.

II

THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS FROM THIS COURT INTENDED TO SAFEGUARD CRITICAL CONSTITUTIONAL RIGHTS

A. The decision conflicts with prior law with regard to a determination of whether banishment violates the *ex post facto* clause

This Court two years ago in *Smith v. Doe*, 538 U.S. 84 (2003) was presented with an *ex post facto* challenge to the Sex Offender Registry in the State of Alaska. In holding the Alaska registration law constitutional the Court set out quite clearly the analytical framework for considering whether such a statute

amounted to "punishment" which would have been proscribed by the *ex post facto* clause.

The Eighth Circuit decision in this case was divided on the question of whether 692A.2A amounted to punishment and therefore violated the *ex post facto* clause. The analysis by the majority, finding the statute not to be punishment, substantially weakened the analytical framework established by *Smith* to the point where the analysis does not constitute much of a barrier at all. This cannot be what was intended in *Smith*.

The Eighth Circuit watered down the *Smith* analysis in two respects. First, the majority decision ignores the factual finding that the statutory banishment is similar to a traditional punishment. Second, the decision does not critically and carefully consider whether the statute is excessive.

One of the five analytical factors to be considered under *Smith* in deciding whether a law is an *ex post facto* violation, is whether the restriction is a traditional form of punishment. 538 U.S. 84 at 98. The Supreme Court in *Smith* specifically identified banishment as one of those traditional forms of punishment. 538 U.S. 84 at 99. The Eighth Circuit's opinion below holds that the law in Iowa did not constitute banishment because offenders were still free to venture into the towns where they could not live. Appx. p. 131a.

While it is true that Iowa offenders can still work in those towns and, for that matter, can even stand right across the street from a school without running afoul of the statute, that fact is beside the point. The District Court made a finding of fact that the statute virtually eliminates all available housing in towns of any size in Iowa. Appx. pp. 39a-40a. As Judge Melloy

observed, that finding is "not clearly erroneous and should therefore be upheld." Appx. p. 140a. The practical effect of such a law is that sex offenders must reside in remote rural areas or in another state. As a practical matter this restriction significantly prevents a sex offender from living in the community. This means that the Iowa statute, for all practical purposes, is same as the historic "banishment."

As Judge Melloy observed;

> The residency restriction is a permanent stigma as well as a law that effectively casts the person out of the community. Further, *Smith* also described banishment situations in which individuals could neither return to their original community nor, reputation tarnished, be admitted into a new one. (citation omitted). Under this phrasing Section 692A.2A fits the definition of banishment. Appx. p. 141a.

In *Smith* this court held that one of the factors to be considered was whether the statute is excessive in relationship to the purpose. 538 U.S. 84 at 97.

Again Judge Colloton and Judge Melloy significantly differed on this part of the analysis. Judge Colloton found the statute was not excessive in light of some of the recidivism evidence and the conclusions of some of the defendants' witnesses that there were never going to be any guarantees that sex offenders would not reoffend. Appx. p. 135a. Judge Melloy however focused on the fact that the statute applies to all sex offenders who offended with minors regardless of the level of risk or the nature of the offense. Judge Colloton dismissed this

analysis by stating that the Supreme Court's discussion of excessiveness does not require "a close or perfect fit." Appx. p. 135a.

As to the possibility of sex offenders reoffending, it is true that in the *Smith* case the Supreme Court all but took judicial notice of a high rate of recidivism posed by sex offenders.[7] The evidence presented in this proceeding was that sex offender recidivism rates are not be as great as had been thought.[8] In fact even if the reoffense rate was 13%, that means that only one out of 7 or 8 offenders will reoffend.

The suggestion of witnesses for the State that one can never really be sure about sex offenders is reminiscent of testimony by

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[7]Such reliance by the Supreme Court and other courts might be outdated. Sex offender treatment only really became available in Departments of Corrections during the 1990s. In addition punishment for sex offenders substantially increased during that same time period. Statistics that were published in 1997 that were discussed by the Supreme Court in *Smith* would have relied on case studies prior to or only at the beginning of such treatment and/or increased punishment. Dr. Rosell, the Plaintiff's expert and former director of the Iowa Department of Corrections program, testified that successful treatment has the effect of reducing recidivism by over 40%. Tr. p. 28.

[8]The Hanson and Bussiere meta study of 61 prior studies concluded that there was a rate of 13.4%. Hanson and Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 JOURNAL OF COUNSELING AND CLINICAL PSYCHOLOGY, No. 2, 348-362. Exhibit 50. That rate, extrapolated from data going back several decades, in turn would have to be factored downward with the growing availability of treatment, which reduces recidivism by perhaps 42%.

witnesses that "anything is possible." One cannot legislate for such remote possibilities without a real concern for producing an exaggerated response.

In *Smith* the Supreme Court accepted the "categorical judgment" by the legislature which was not individualized because the restraint at issue in *Smith* was the "more minor condition of registration." 538 U.S. 84 at 104. This was in contrast with the individualized determination in *Kansas v. Hendricks*, 521 U.S. 346 (1997) where there was a much greater restraint. Given the very significant consequences that accompany the Iowa statute *Smith* requires a greater fit for this particular statute.

The Iowa statute is excessive and unnecessary in a variety of ways.

1. It applies to all sex offenders who had minors as victims regardless of the nature of their crime and the kind of school nearby. Teenage offenders with teenage victims do not have to be kept away from childcare facilities. Dr. Rosell testimony, page 21.

2. There is no reason to keep sex offenders away from childcare facilities. Dr. Rosell sees no safety concern whatsoever with regard to childcare facilities. Toddlers just do not walk home by themselves. Children are picked up and dropped off every morning by their parents. Given state-mandated supervision, there is no safety interest enhanced by the two thousand foot law. Trans. p 43;

3. The statute applies regardless of level of risk. For years Iowa classified its offenders by level of risk. It is excessive to apply this residency restriction to a person who was determined

to be low risk.

4. The statute applies regardless of whether individuals are presently on supervision. Probation officers can always keep the person away from a particular facility, if, upon an individual determination, that seems appropriate. After making that individual determination, various probation officers had no objection to various John Does living within 2000 feet of particular childcare facilities.

5. There is no scientific evidence whatsoever that there is any greater safety if a sex offender does not live within 2000 feet of these schools. Almost half of all sex offenses occur within the home. Another twenty-five (25) to thirty (30) percent offend with friends and neighbors. (Rosell Tr. p. 19.)[9]

6. The restriction applies for life.

Perhaps more importantly there is evidence that the statute can decrease safety. It decreases safety in a number of ways:

1. If individuals know that their residence is unlawful they may not register at all. Thus the statute may undercut the effectiveness of the registration process.

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[9]None of the scientific studies of recidivism have even looked at proximity to a school as a factor in re-offending. (Tr. p. 38) For all this time people who have been studying the problem have, in fact, been trying to identify the factors of re-offending. No one has even thought enough about proximity to a school to even test that supposition. (Tr. p. 73) The one exception is the Minnesota study, Exhibit 41. That study was prompted by legislative interest in laws such as Iowa's restricting where sex offenders can live. The Minnesota Department of Corrections study concluded that there was no connection at all between reoffending and living near a school or childcare center.

2. The statute undercuts the abilities of individuals to obtain viable treatment. The State's expert, Dr. McEchron testified that treatment would be harmed if individuals' lives became chaotic. Deposition p. 38. Not having a legal place to live, obviously, would be chaotic. Moving all the sex offenders into particular sex offender ghettos, or into the country where they experience isolation, is not conducive to treatment. Dr. McEchron also believed taking offenders away from their family and support systems interferes with treatment. Deposition pp. 56-7. By undercutting treatment, safety is diminished. Dr. Rosell agreed with both of these conclusions. Tr. p. 41.

This Court should reach the same conclusion reached by Judge Melloy as to whether the Iowa statute is excessive.

> (T)he severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive. Appx. p. 143a.

The question of whether the Iowa Statute is punitive deserves more scrutiny than the Eighth Circuit gave. The *Smith* analysis would not have authorized such a severe statute as Iowa adopted. For this reason this court should grant *certiorari*.

B. <u>The decision conflicts with prior law with regard to the fundamental right to travel</u>.

This Court has long recognized the fundamental right to

travel. In *United States v. Guest*, 383 U.S. 745, 757 (1966), the Supreme Court stated that the "constitutional right to travel from one state to another occupies a position fundamental to the concept of our federal union. It is a right that has been firmly established and repeatedly recognized." This right is protected by the Due Process Clause of the United States Constitution. See also *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1968). This right clearly includes the right to move to someplace and make a home. In *Saenz* the Supreme Court stated:

> Our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause (Privileges and Immunities) for 'the citizen of State A who ventures into State B to settle there and establish a home.' *Zobel* 457 US at 74 (O'Conner, J., concurring in judgment). 526 U.S. 489 at 502.

The *Shapiro* decision clearly recognizes a right to migrate and resettle. 394 U.S.618 at 629 ("the right to travel includes the right to migrate, resettle, find a job and start a new life.")[10] In order to establish a violation of the right to travel, it is only necessary to show that the statute *potentially* deters travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 at 257-58.

Here class members live out of state and want to move back

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[10]See also *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-40(1972); See also Clark Allen Peterson, *The Resurgence of Durational Residency Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. LAW REVIEW, 305, 316-17(1993).

to Iowa. John Doe XIII, for example, left the state because there was no legal place to live. He lives in Indiana and wishes to return. Appx. p. 49a. The right to travel is implicated or negatively affected by a law in Iowa that essentially says that he cannot move back and live in any town or urban area. Telling out of state class members that they cannot live in most urban areas in Iowa potentially deters them from traveling to the state to live.

Most members of the class live in Iowa. Many are grandfathered into residences they were occupying on July 1, 2002. As time passes, more and more class members are having problems with the statute. The statute essentially says that they cannot move to another residence in most of the urban areas of the state. A person who, for whatever reason, loses this grandfathered residence cannot find another home in much of the state.

While not yet specifically recognized by a case from this court, the right to intrastate travel is similarly protected by the fundamental constitutional right to travel. The Sixth Circuit addressed this claim in *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002). That case found that the Cincinnati ordinance that excluded drug offenders from parts of the city was unconstitutional, specifically recognizing the right of individuals to move within the State of Ohio.[11] Judge

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[11]For other cases finding a constitutionally protected right to intrastate travel, see *Spencer v. Casavilla*, 903 F.2d 171, 174 (2nd Cir. 1990); *Lutz v. City of York*, 899 F.2d 255, 268 (3rd Cir. 1990). For state cases finding the right to intrastate travel violated by a banishment provision as a probation condition, see *People v. Beach*,

Colloton's opinion spoke highly of this right to intrastate travel, even quoting *United States v. Wheeler*, 254 U.S. 281, 293 (1920) as recognizing the fundamental right to "dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." Appx. p. 116a.

At the same time Judge Colloton rejected the argument that any fundamental right to travel, whether inter or intrastate, was violated. He reached this conclusion because he found that the Iowa statute "imposes no obstacle to a sex offender's entry into Iowa and does not erect an actual barrier to interstate movement." Appx. p. 114a. He reached the same conclusion with regard to intrastate movement. Because there is no real "obstacle" to travel, whether intrastate or interstate, he concludes that the constitutional analysis should not be done using strict scrutiny. Not surprisingly he then found the statute constitutional. Appx. p. 118a.

The statute however does create real barriers around most towns and cities in Iowa. The barrier exists in that sex offenders cannot live in those areas. It would be no less a barrier if the Legislature actually declared that sex offenders could not live in any town or city over 250 people. The right to travel protects the right to move someplace and establish a home. The Iowa statute is a barrier to the exercise of that right.

It is no less a barrier if sex offenders can come into the city

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147 Cal. App 3d 612, 622 (2nd Dist. 1983); See also *State v. Franklin*, 604 N.W.2d 79, 84 (Minn. 2000); *In re J.W.*, 787 N.E.2d 747, 763 (Ill. 2003).

limits of such towns for employment or shopping. If offenders cannot make their homes in a town, there is a barrier created by this statute that is real, is significant, and that implicates the right to travel.

If the fundamental right to travel is implicated, then 692A.2A strict scrutiny applies. Under that scrutiny the statute is the same exaggerated response as was discussed under *ex post facto* analysis. See Petition at p. 20-22. The statute should be found to be unconstitutional.

C. The decision conflicts with prior law with regard to the fundamental right to live with your family.

Twenty-five (25) years ago in the case of *Moore v. City of East Cleveland*, 431 U.S. 494, 503-4 (1977) this Court recognized that a zoning ordinance that substantially interfered with the ability of an extended family to live together impinged on a fundamental right protected by the Due Process Clause of the United States Constitution. Such an ordinance was different from the one that had been upheld in *Village of Bel Terre v. Boraas*, 416 U.S. 1 (1974). In that case the Supreme Court had found no constitutional problem with an ordinance that limited unrelated people living together. In the *Moore* case, however, the Court found that there was something special about the fact that the people who wanted to live together were actually part of the same family. Given that critical difference, the statute was subjected to strict scrutiny and was found wanting.

In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) the Supreme Court discussed the constitutionally protected "freedom of association." The Court said that it had

identified a line of decisions that had "concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role such relationships in safeguarding the individual freedom that is central to our constitutional scheme." 468 U.S. 609 at 617-8.

Iowa Code Section 692A.2A interferes with that fundamental right to live with your immediate family. In the first place the Iowa statute greatly limits the ability of class members to find any place to live. Under those circumstances, the one place many offenders look to for a place to live, is their family. The Iowa statute effectively prevents most sex offenders from moving in with their immediate family members because often those family members live in a town or city. Even if family members were inclined to move away from their homes, they would be unable to find a place under this statute.

John Doe IV was in prison in June 2003. He received a parole when it was determined that it was safe for him to return to the community. He wanted to come out and live with his mother in Mason City. This was an acceptable residence to his parole officer. Indeed parole officers often want offenders coming out of prison to live with family precisely because they regard it as a good support system. That in turn is important to successful treatment. This could not happen until the statute was enjoined because his mother lived within two thousand feet of a school or child care facility. Appellee's App. p. 44a.[12]

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[12]John Doe VI also wanted to live with his mother. He bought a home and they moved in together. This was acceptable to his parole officer. He was required to move because of the statute. Appx. p.

In this case, the statute does not directly prohibit members of the class from being able to live with their family members. The panel from the Eighth Circuit concluded that this lack of direct effect meant that there is no strict scrutiny, citing cases that say that certain incidental effects do not require strict scrutiny. Appx. p. 112a. On some level unless certain words appear in the statute, the effect of any statute can be called "incidental". Whether something is "incidental" however does not say anything about whether it is "significant." That term ought to be the one that is used in considering whether strict scrutiny applies. In *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978) the Supreme Court struck down a Wisconsin law that required court permission to marry under certain conditions. The Court noted the following:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents

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44a-45a.

John Doe VIII was living in Iowa City without a legal residence. He wanted to move in with his parents, but that was prohibited by the statute. It was all right with his probation officer who did not think there was a safety reason to keep him out of his parents' home. App. p. 45a-46a.

John Doe XV was given work release by the Board of Parole. Because of the injunction, he was able to leave the work release center and go live with his mother. This was an acceptable residence. If the statute went back into effect, he would not be able to live with his mother. Appx. 51a-52a.

John Doe XVII was also released from prison. He wanted to live with his adult son. This was not permitted by the statute. App. p. 52a-53a.

> of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. 434 U.S.374 at 384.

The banishment created by the Iowa statue does in fact significantly interfere with the ability of the class members to live with their immediate family members. It is true that the family members could try to move from their established homes to the country to find a legal residence. Even if they could find such a residence, this requirement that they move would be a substantial burden. The legal question should be whether the Iowa statute creates a substantial burden on families living together. Given the factual determination regarding banishment and the interest in class members being able to live with family members, this Court should find a fundamental right involved and grant *certiorari*.

CONCLUSION

In July 2002, Section 692A.2A went into effect. This lawsuit was filed almost a year later, after the effects of the law began to be felt. During that year it became clear that the law has the effect of eliminating almost all housing for affected sex offenders. In fact it eliminates most housing in towns with a population of more than a couple hundred people. The statute effectively banishes most sex offenders to small towns and to

the countryside.[13] As the small towns figure this out they in turn will now take measures to avoid becoming sex offender havens. Given the lack of available housing in those areas the statute will make even more sex offenders homeless.

This law is unconstitutional in a number of ways. It violates several fundamental constitutional rights. It is punishment amounting to an *ex post facto* violation when applied to people who committed their crimes before July 1, 2002.

The intent of the legislature was to keep children safe. When all is said and done, however, this statute does not do that. In some ways it may increase the risk to children. While failing to keep children safe, the statute imposes a tremendous cost.

When society releases persons from prison or probation, when their sentences are over and the state is not asserting a right to keep them locked up, there must be someplace for those persons to live. In Iowa at this time that is not the case for sex offenders.

This court should grant *certiorari* to address the important questions presented by the Iowa law.

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[13]As this petition is being written, the small town of Ely, Iowa located in Linn County has just figured out from the new county map, that because they have no school or childcare facility, that the town has no restrictions. The city council is meeting to consider an ordinance to ban sex offenders from living within 2000 feet of a park. (They must have one of them.) Dick Hogan, *Ely considers sex offender restrictions*, THE CEDAR RAPIDS GAZETTE, September 24, 2005, pp. 1A, 8A. The council must not realize from reading the record in this case that they can accomplish their goal by finding a person to register a child care home.

No. _____

In The
Supreme Court of the United States

JOHN DOE I, JOHN DOE II, JOHN DOE III, on their own behalf and on behalf of the class -

Petitioners,

v.

THOMAS J. MILLER

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN DOE I, JOHN DOE II, and JOHN DOE III, on their own behalf and as representatives of the class of sex offenders in the State of Iowa,	*	3:03-cv-90067
Plaintiffs	*	
v.	*	
TOM MILLER, Iowa Attorney General and J. PATRICK WHITE, Johnson County Attorney and MICHAEL WOLF, Clinton County Attorney, as representatives of the class of all county attorneys in Iowa,	*	MEMORANDUM OPINION AND ORDER
Defendants.	*	

Three named Plaintiffs bring this action on behalf of a proposed class of Plaintiffs to challenge the constitutionality of the recently enacted Iowa Code § 692A.2A, which prohibits sex offenders, whose offenses were committed against minors, from residing within two-thousand feet from a school or child care facility. Presently before the Court are Plaintiffs' Motions to certify this action as a class action comprised of both plaintiff and defendant classes. Plaintiffs ask the Court to certify a Plaintiff class to include all sex offenders in Iowa, and a Defendant class made up of Iowa's individual County Attorneys. Plaintiffs also move for a Temporary Restraining Order (TRO), pursuant to Federal Rule of Civil Procedure 65(b), to enjoin Defendants from enforcing § 692A.2A until the parties have an opportunity to present evidence on preliminary injunctive relief. For the reasons explained below, Plaintiffs' Motions are granted.

I. IOWA CODE § 692A.2A

On May 9, 2002, Iowa Governor Thomas Vilsack signed Senate File 2197 into law. Effective July 1, 2002, Senate File 2197, now codified at Iowa Code § 692A.2A, states in full:

§ 692A.2A Residency restrictions – child care facilities and schools.

1. For purposes of this section, "*person*" means a person who has committed a criminal offense against a minor, or an aggravated offense.

sexually violent offense, or other relevant offense that involved a minor.

2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
   a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
   b. The person is subject to an order of commitment under chapter 229A.
   c. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
   d. The person is a minor or a ward under a guardianship.

The plain text of § 692A.2A states that the statute

applies to any person who has committed a criminal offense against a minor. Plaintiffs indicate in their brief, however, that the law is generally being interpreted as applicable to individuals who have committed sex crimes against minors. Where applicable, the statute restricts the area in which an affected person may reside to places that are not within two-thousand feet from a school or child care facility. As the restriction is limited to residency, § 692A.2A does not otherwise prohibit an individual's presence within the restricted zone; affected persons are free to travel, work, or generally move about within any area. The statute contains no time frame regarding when a person committed his or her crime, but does include a limited "grandfather clause," whereby an individual who has established a residence prior to July 1, 2002 is exempted from the area restrictions. The duty to enforce § 692A.2A lies with the Iowa Attorney General and the individual County Attorneys for each of the State's ninety-nine counties. *See* Iowa Code §§ 13.2, 331.756(1).

II. CLASS CERTIFICATION

Plaintiffs ask the Court to certify both a Plaintiff and a Defendant class in this action. A proposed class must meet the requirements of Federal Rules of Procedure 23(a) and (b) in order to be certified. Section (a) of Rule 23 provides the prerequisites for any class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or

> defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Section (b) then lays out additional requirements that must be satisfied, depending on the type of class action:

> (1) the prosecution of separate action by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b). The party seeking class certification has the burden of showing that these prerequisites and requirements

are met. *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994).

A. Plaintiff Class

Plaintiffs move the Court to certify a Plaintiff class consisting of "all sex offenders currently living in the state of Iowa, or who might wish to live in the state of Iowa." Plaintiffs ask the Court to specifically exclude from the class, any individual who is currently being prosecuted for a violation of § 692A.2A. In their Motion, Plaintiffs contend that the proposed class satisfies the requirements of Rule 23(a) and (b), and is, therefore, appropriate. The Court agrees.

1. Numerosity

Plaintiffs note that there are currently over 5000 sex offenders in Iowa, and over 4500 of these individuals had minors as their victims. Joinder of all of these parties would be undeniably impracticable. Add to this an untold number of persons who would fall under the purview of § 692A.2A should they ever move to Iowa and the numerosity requirement is certainly satisfied.

2. Common Questions of Fact or Law

Defendants contend that a Plaintiff class is inappropriate because of the individual circumstances of each potential Plaintiff. Defendants ask instead that the Court deal with each potential Plaintiff as he or she comes forward. Defendants offer nothing else to support their objection to certification of a Plaintiff class and the Court is unpersuaded.

Plaintiffs' Complaint attacks § 692A.2A on its face as an unconstitutional punishment and as an infringement on an

individual's right to family privacy and free travel; the Fifth Amendment right against self incrimination; and procedural Due Process guarantees of notice and an opportunity to be heard before being deprived of personal liberties. The Complaint and Affidavits from several John Does detail the effect of the statute on particular individuals, but Plaintiffs seek to challenge, as a class, the application of § 692A.2A to any individual included in the statute's definition of "person". The constitutional rights and civil liberties asserted are immutably held by all persons implicated under § 692A.2A. Accordingly, common questions of law abound irrespective of the facts of each class member's individual circumstances. As Plaintiffs bring this action as a facial challenge to § 692A.2A rather than as applied to each individually named Plaintiff, the Court finds that the commonality requirement is satisfied.

One exception here involves those persons who are currently being criminally prosecuted for violations of § 692A.2A. Under the *Younger* abstention doctrine, federal district courts should "abstain from hearings cases when (1) there is an ongoing state judicial proceeding which (2) implicates important state interests, and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented." *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002) (quoting *Fuller v. Ulland*, 76 F.3d 957, 959 (8th Cir. 1996)). *See also Younger v. Harris*, 401 U.S. 37 (1971). Accordingly, the Court must abstain from interfering with the state court proceedings that have already been commenced, as the state courts of Iowa are

more than capable of assessing the constitutional validity of § 692A.2A as it is applied to these individuals. For this reason, the Court adopts the suggestion of Plaintiffs and excludes from this class action those individuals who are currently involved in state court proceedings regarding Iowa Code § 692A.2A.

3. Typicality and Adequate Representation

The third and fourth components of Rule 23(a) require that the claims or defenses of the class representatives be typical of those of the class, and that the class representatives will fairly and adequately protect the interests of the class. There is no suggestion that the claims of the named John Doe Plaintiffs are atypical from the claims of other class members. As well, the Court has no reason to doubt the ability of the named Plaintiffs and their attorneys to fairly and adequately represent the interests of the class. The Court, therefore, finds that the four elements of Rule 23(a) are satisfied.

4. Type of Class Action - Rule 23 (b)

As noted above, in addition to satisfying the four elements of class certification set forth in Rule 23(a), a proposed class must be maintainable as one of the three types of class actions defined in Rule 23(b). Here, Plaintiffs argue that the proposed class is properly maintained under 23(b)(1)(A), as prosecutions of separate actions by the class members would create a risk of inconsistent judgments with respect to the members of the class which would establish incompatible standards of conduct for the Defendants. The Court agrees. Were the Court to deny class certification, thereby compelling each member of the Plaintiff class to individually challenge § 692A.2A against each

of the various County Attorneys, the risk of inconsistency is enormous.

5. Class Defined, Notice, and Exclusion from Class

Pursuant to Rule 23(c)(1), the Court finds that the proposed Plaintiff class satisfies all of the requirements of Rule 23, and hereby certifies a Plaintiff class in this action under Rule 23(b)(1)(A). The Plaintiff class shall be defined as "All individuals defined as a "person" by Iowa Code § 692A.2A (1) currently living in the state of Iowa, or who might wish to live in the state of Iowa, excluding those individuals currently being prosecuted under Iowa Code § 692A.2A in the Iowa state courts." As the Plaintiff class is certified under Rule 23(b)(1)(A), the notice and exclusion provisions of Rule 23(c)(2) are inapplicable.

B. Defendant Class

Plaintiffs also move the Court to certify a Defendant class in this action including all County Attorneys in the State of Iowa, in their official capacity. Plaintiffs have named J. Patrick White, Johnson County Attorney, and Michael Wolf, Clinton County Attorney, as class representatives. Defendants have not opposed the certification of a Defendant class, but both Mr. White and Mr. Wolf have expressed reluctance to being named as class representatives.

The analysis of the proposed Defendant class is largely identical to that for the Plaintiff class. Again looking at the requirements of Rule 23(a): 1) with ninety-nine counties in Iowa, joinder of each individual County Attorney is impracticable; 2) as with the Plaintiff class, there are questions

of law common to all Defendants; and 3) the defenses of the representative Defendants appear to be typical of the defenses of the class of Defendant County Attorneys.

As for the fourth requirement of Rule 23, fair and adequate representation of the interests of the class, the representative Defendants' reluctance to serve as class representatives must be addressed. The Ninth Circuit Court of Appeals has stated that "[a]dequate representation 'depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162) (9th Cir. 2001) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995) (quoting *Brown v. Ticor Title Ins. Co* , 982 F.2d 386, 390 (9th Cir. 1992))). The proposed Defendant class members and the named representatives in the present action are all Iowa County Attorneys who must each satisfy identical requirements under Iowa Code § 331.751(2) to hold office. Each individual class member is, therefore, equally qualified to act as a class representative. There is no suggestion that this lawsuit is collusive.

The question, then, is whether the named class representatives share the interests of the class without antagonism. All County Attorneys in Iowa are charged by law with a duty to "[d]iligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the

state, county, or as county attorney, except as otherwise provided." Iowa Code § 331.756(1). As a County Attorney has a duty to enforce, or cause to be enforced, the laws of the State, it follows that this duty must extend to defending the constitutionality of those same laws. Refusal, reluctance, or any other form of goldbrick representation would be to shirk the duty imposed on the official by the voters of his or her county. Both named County Attorneys have now appeared before the Court to defend § 692A.2A, and neither has flatly refused to serve as a class representative.[1] The Court, therefore, has no reason to believe that either party intends to forego his duty to diligently enforce or cause to be enforced the law of the State.[2] Accordingly, the Court finds that the Johnson and Clinton County Attorneys will fairly and adequately protect the interests

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[1]In a recently filed response, Defendant White states that he has no objection to being ordered to serve as a class representative.

[2]The Court takes judicial notice of the fact that both Mr. White and Mr. Wolf enjoy excellent reputations as fine lawyers and well-regarded public servants. The Court further notes that Defendant Tom Miller, the Iowa Attorney General, is vigorously defending § 692A.2A.

[3]As the interests of the Attorney General and the Defendant class of County Attorney are largely similar, the Court assumes that the work involved in defending § 692A.2A will, most likely, be shared between the State and County offices.

of the Defendant class of County Attorneys.[3]

Having found that the Defendant class satisfies the requirement of Rule 23(a), the Court must again determine whether the action may be maintained as a class action under Rule 23(b). As with the Plaintiff class, the Court finds that Rule 23(b)(1)(A) applies in the present case as prosecution of separate actions would create a risk of inconsistent adjudications which would establish incompatible standards of conduct for the Defendant County Attorneys. For these reasons, the Court hereby certifies a Defendant class under Rule 23(b)(1)(A), defined as "all County Attorneys for the State of Iowa, in their official capacities." As with the Plaintiff class, the notice and opt-out provisions of Rule 23(c)(2) do not apply to a class certified under 23(b)(1). All members of the defined class will, therefore, be bound by the Court's orders.

Although the named Defendant class representatives are qualified and charged with the duty to defend the interests of the Defendant class of county attorneys, the Court is well aware of the tensions that may arise among class members based on the fact that the Defendant class representatives were named by Plaintiffs. The Court has within its power the ability to replace class representatives with other class members or to increase the number of class representatives. *See Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999). The Court, therefore, invites the members of the Defendant class to discuss which member or members they would choose to serve as the

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class representative(s). Motions or affidavits regarding a change in class representation must be received by the Court by August 18, 2003 so the Court may consider the request and make any changes in time for the September 15, 2003 hearing on Plaintiffs' Motion for Preliminary Injunction. Because, however, Defendants White and Wolf are individually named as Defendants in this action, Plaintiffs alone have the option of dismissing them at this stage of the proceedings.

III. TEMPORARY RESTRAINING ORDER

Plaintiffs next move the Court to issue a temporary restraining order (TRO) pursuant to Fed.R.Civ.P. 65(b), to enjoin Defendants from enforcing Iowa Code § 692A.2A until the Court has an opportunity to fully consider Plaintiffs' request for a preliminary injunction.[4]

Under Rule 65(b), a TRO may issue without notice or hearing only if (1) it is clear that immediate and irreparable

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[4]Although Plaintiffs' Motion is for temporary restraining order, Defendants were given notice and were heard at the July 14, 2003 hearing. The Court also left the record open until July 25th to allow Defendants to submit any additional evidence or argument in opposition to Plaintiffs' request for the TRO. As such, the Motion is treated similarly to a motion for a preliminary injunction, and the ten day limitation on the duration of the TRO does not apply. *See* C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* § 2951 (1995). *See also Kansas Hosp. Ass'n v. Whiteman*, 835 F.Supp. 1548, 1551 (D. Kan. 1993) (citing Wright & Miller); *Saint v. Nebraska School Activities Asso.*, 684 F.Supp. 626, 627, n. 1 (D. Neb. 1988)(citing Wright & Miller).

harm will result before the adverse party can be heard in opposition, and (2) if the applicant certifies in writing the efforts that have been made to give notice and the reasons why notice is not required. Here, notice is of no concern as Defendants had an opportunity to be heard at the July 14, 2003 hearing.

In this Circuit, analyzing a plaintiff's request under Federal Rule of Civil Procedure 65 requires application of the standards enunciated in *Dataphase Sys., Inc., v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc). *See United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178 (8th Cir. 1998). The *Dataphase* test is applicable to a motion for a TRO as well as to a motion for a preliminary injunction. *See S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989); *Sports Design and Development, Inc. v. Schonebdom*, 871 F.Supp. 1150, (N.D. Iowa 1995).

The *Dataphase* test involves the examination of four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc.*, 640 F.2d at 113. The Eighth Circuit has determined that no single *Dataphase* factor is dispositive; all factors must be considered and balanced to determine whether to grant a restraining order. *See International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Schimmel*, 128 F.3d 689, 691 (8th Cir. 1997). The burden of establishing the propriety of a TRO is on the movant.

See Baker Elec. Co-op., Inc. v Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734,737 (8th Cir. 1989) (en banc)).

A. Threat of Irreparable Harm

Although none of the *Dataphase* factors are individually dispositive, the Eighth Circuit has noted that "the failure to demonstrate the threat of irreparable harm is, by itself, a sufficient ground upon which to deny [temporary injunctive relief]." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998) (internal citation omitted). Plaintiffs offer affidavits from nine members of the Plaintiff class as evidence of the threat of irreparable harm to members of the class if injunctive relief is not granted.[5]

1) John Doe I was convicted of second degree sexual assault in Wisconsin in 1994 for having consensual sex with a girl who was almost fifteen when he was eighteen. This behavior does not constitute a crime under Iowa law, but John Doe I was still required to register as a sex offender when he moved to Iowa for school. John Doe I currently resides in Iowa City. He currently resides in an apartment that is within the restricted zone under § 692A.2A, but he established this residence prior to July 1, 2002. On August

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[5]Plaintiffs have asked that the identities of the class members be concealed. The Court agrees with Plaintiffs' desire to protect their privacy on these sensitive issues and will, therefore, refer to the affiants using Plaintiffs' requested John Doe pseudonyms.

1, 2003, John Doe I wishes to move to a new apartment in the same apartment complex. Doing so would require him to register a new residence, thereby placing him in violation of the residency restriction. A map of Johnson County shows that there is virtually no place in Iowa City for a sex offender to live. As John Doe I is a student at the University of Iowa, he expresses concern about being able to continue his studies while being compelled to reside in a rural area outside Iowa City.

2) John Doe II pleaded guilty to third degree sexual abuse in August 2002 for having consensual sex with a fifteen year old girl when he was twenty years old. John Doe II currently resides in Iowa City at a location that is in violation of § 692A.2A. The Johnson County Sheriff's Department is aware of the fact that John Doe II is currently in violation of the statute, but has given him until August 1, 2003 to find a suitable residence. John Doe II maintains that he has attempted to find a legally acceptable residence since April 2003, when he was evicted from his apartment, but he has been unsuccessful in locating such a place.

3) John Doe IV currently resides at the Mount Pleasant Correctional Facility in Mount Pleasant, Iowa because of a third driving while intoxicated conviction. John Doe IV was paroled by the Iowa Board of Parole on June 10, 2003, but has not been allowed to leave prison because he cannot find an acceptable residence. John Doe IV wishes to live

with his mother in Mason City, but is unable to do so because her residence is within a restricted area. John Doe IV's mother states in a separate affidavit that she was told of two apartment complexes in Mason City that might be suitable, but neither has vacancies. John Doe IV's mother states that her son is certainly welcome to live with her if not for § 692A.2A. John Doe IV is subject to the restrictions of the Statute because of a 1992 offense against a minor that was adjudicated in juvenile court because John Doe IV was fourteen years old at the time.

4) John Doe V has been serving a fifteen year sentence at the Mount Pleasant Correctional Facility after pleading guilty to second degree sexual abuse. He has completed the Sex Offender Treatment program and received a parole in March of 2003. As with John Doe IV, John Doe V remains incarcerated in spite of receiving a parole because he cannot find a suitable place to live. If he is released, John Doe V would like to live with his wife in the Des Moines area. He states that it would be an extreme hardship for his wife to have to live outside of Des Moines. A map of the City of Des Moines shows that the 2000 feet residency restriction bars individuals covered by § 692A.2A from living virtually anywhere except for a few blocks in some of the city's most exclusive neighborhoods. As such, John Doe V's wife has been unable to find an acceptable residence, and John Doe V remains incarcerated four months after receiving a parole.

5) John Doe VI states that he purchased a house for himself and his elderly and infirm mother after the address was cleared by the Des Moines Police Department. About six weeks after they moved into the house on April 1, 2003, John Does VI's mother received a call from the Des Moines Police Department Sex Offender Division stating that John Doe VI would have to move out as the house was actually within two thousand feet of a school. John Doe VI found and moved to an acceptable apartment in a Des Moines suburb, but is unable to maintain payments on both the apartment and the house. Since being forced to move to the apartment, John Doe VI has suffered a heart attack and now has medical bills to contend with in addition to two housing payments. During the first part of July, John Doe VI was told to move out of the apartment as the owner does not want to rent to a sex offender. He has been since been unable to find any place to live that is not in violation of § 692A.2A. John Doe VI received a twenty-five year sentence for sexual abuse in the second degree in 1993 and remains on supervised parole until 2005.

6) John Doe VII lives with his wife and child in rural Linn County, Iowa and works in Cedar Rapids. He must register as a sex offender in Iowa because he was convicted of the crime of indecent liberties with a child under Kansas law.[1]

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[1]The statutory crime of indecent liberties with a child, Kan. Stat. Ann. §21-3503 replaced what was commonly known as statutory

John Doe VII's wife is expecting another child and the family wishes to move to make room for the new baby and because of a significant pest problem in their present residence that the landlord has been unwilling to correct. John Doe VII has investigated upwards of twenty-five locations in Cedar Rapids, Iowa, but none are beyond two-thousand feet from a school or daycare center. The Linn County Sheriff's Department will not provide John Doe VII with a list of places to live in Cedar Rapids, but claim that they know "that there are a few places on one side of town." The Sheriff's Department will not tell John Doe VII where these places are, and he has been unable to fine a legally acceptable residence.

7) John Doe VIII was convicted of the aggravated misdemeanor of sexual exploitation of a minor under Iowa Code § 728.12(3) for possessing improper pictures from the internet. Because his crime involved an offense against a minor, John Doe VIII is subject to the residency restriction of § 692A.2A. John Doe VIII was recently evicted from his apartment and presently lives with his parents in Iowa City. As his parents' home is within two-thousand feet of a school or child care facility, he is currently living in violation of § 692A.2A. John Doe VIII works in Coralville and attends school at Kirkwood Community College. He states that he

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rape. *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1276 (Kan. 1993).

would be unable to do either if compelled to live in the country as he has no driver's license.

8) As with John Doe VIII, John Doe IX was convicted under Iowa Code § 728.12(3) for downloading inappropriate material from the internet that involved minors. John Doe I X registered with the Johnson County Sheriff's Department and was given a list of four apartments that would be legally acceptable. After checking, John Doe IX learned that none of the listings had any current openings. He is currently living in violation of § 692A.2A and cannot find a place that is legally acceptable.

9) John Doe X and his wife both receive Social Security Disability payments because of mental retardation and mental illness. John Doe X has no regular employment, but he occasionally finds work through government sponsored work groups. In June of 2002, John Doe X, was convicted, as a pro se defendant, of a serious misdemeanor for violating Iowa Code § 709.14, lascivious conduct with a minor John Doe X has been discharged from probation and is not included on the published list of sex offenders because he is classified as a low risk to re-offend. Regardless, John Doe X must abide by the terms of § 692A.2A as his offense was committed against a minor. John Doe X had lived in a trailer home with his wife in Carroll, Iowa, but must now find a new residence as his wife recently sold the trailer. As John Werden, the Carroll

County Attorney, confirmed at the July 14 hearing, John Doe X cannot live anywhere in the City of Carroll because of the 2000 feet restriction. John Doe X avows that if the County Attorney is allowed to enforce § 692A.2A, he will in all likelihood be homeless as he can find no place to legally reside.

Defendants argue that Plaintiffs have not shown a threat of irreparable harm, and offer statements from Coralville and Iowa City police officers identifying potentially legal housing in these two communities. Defendants also challenge the allegations of John Does II and VIII that they were recently evicted as Defendants were unable to discover any formal records of evictions. Lastly, Defendants note the actions taken by the Coralville Police Department to work with certain individuals affected by § 692A.2A. The fact that limited housing may be available, that John Does II and VIII may not have been formally evicted from their apartments, or that government officials may assist some class members in finding suitable housing before commencing prosecution has little effect on Plaintiffs' statements.

The collective result of the Court's review of the Plaintiffs' proffered affidavits reveals that two class members, John Does IV and V, will remain in prison regardless of receiving a parole unless the Defendant class is enjoined from enforcing § 692A.2A. At least four class members, John Does I, II, VIII, and IX, face an immediate or imminent threat of criminal prosecution as they are currently, or will soon be, living in violation of § 692A.2A. John Doe VI has nowhere to live so long as § 692A.2A is in force as he has been evicted from the

apartment he rented after the Des Moines Police Department told him that he could not live in the house they had approved a short time before. Unless Defendants are enjoined from enforcing § 692A.2A, John Doe VII and his family must continue to live in a residence that is not only too small to accommodate their growing needs, but that is plagued by a pest problem the landlord will not remedy. Finally, John Doe X, a mentally retarded man, may end up homeless as the Carroll County attorney has made clear both his intent to enforce § 692A.2A and the fact that there are no legally acceptable residences in the City of Carroll. Although the nine John Doe class members represented in Plaintiffs' affidavits make up but a small percentage of the class as a whole, the threat of irreparable harm to these individuals is enormous. As the Court has already found, the claims of the class representatives and the identified John Doe class members are typical of the class as a whole.

In bringing this action, Plaintiffs argue that Iowa Code § 692A.2A violates a number of their constitutional rights. Absent injunctive relief, a number of the identified members of the Plaintiff class and countless unidentified class members will face criminal prosecutions for exercising what they believe is their constitutional right to live in privacy with their families where they so choose. "An individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril." *Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J. concurring). With the words of Justice Stevens in

mind, the Court finds that Plaintiffs have successfully demonstrated a threat of irreparable harm.

B. Balance of Harm Against Injury to Other Litigants and Public Interest

The second *Dataphase* factor instructs the Court to balance the harm to Plaintiffs against the injury that granting the injunction will inflict on other parties to this litigation. The threatened harm to Plaintiffs includes criminal prosecution, continued incarceration, untenable living situations, economic loss, and forced vagrancy. Defendants' interest is their duty to enforce the laws of the State of Iowa. As noted above, this interest is a function of their office as elected officials; it is not personal. The Court agrees with Plaintiffs that Defendants' interest is further attenuated by the fact that Plaintiffs' Complaint raised a number of substantial challenges to § 692A.2A under the United States Constitution, which Defendants are also sworn to uphold. As such, the Defendants themselves should prefer resolution of the constitutional issues involved here before they embark on continued prosecutions of § 692A.2A. Accordingly, the Court finds that the harm to Plaintiffs greatly outweighs any potential harm to the interests of Defendants.

The same can be said for the fourth *Dataphase* factor, the public's interest in granting injunctive relief. Plaintiffs contend that although the public has an undeniable interest in ensuring public safety and in having the laws of the State enforced, the public has an even greater interest in assuring that constitutional violations are remedied. Plaintiffs are correct; "it is always in

the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979); *Planned Parenthood Association v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987)). The Court, therefore, finds that the public interest is served by enjoining Defendants from enforcing Iowa Code § 692A.2A.

C. Likelihood of Success

The final factor requires the Court to consider the likelihood that Plaintiffs will succeed on the merits of their claims. As these proceedings are in their infancy, the Court can do little more than speculate about the eventual outcome of this case. The Eighth Circuit notes that such speculation "militates against any wooden or mathematical application of the test," and instead advises that "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *United Indus. Corp.*, 140 F.3d at 1179 (quoting *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, (8th Cir. 1987) (quoting *Dataphase*, 640 F.2d at 113)).

Here, Plaintiffs have raised a number of substantial constitutional challenges to Iowa Code § 692A.2A. Defendants have not had an opportunity to respond to these legal arguments, and the Court is not prepared to address the merits

of the same at the present time. As well, Iowa Code § 692A.2A appears unique among state laws, and no federal court has had an opportunity to consider a similar statutory scheme. The Court, therefore, turns to the one court that has reviewed § 692A.2A. In an extremely well reasoned opinion from the Iowa District Court for Washington County, Judge Lucy Gamon found § 692A.2A unconstitutional as applied to a criminal defendant based on a number of the same issues raised in the present case. *See* Plaintiffs' Exhibit A, *State of Iowa v. Keith Frederick Seering*, Criminal No. AGIN006718.[7] Having not yet fully considered Plaintiffs' claims or Defendants' anticipated opposition, the Court currently has no reason to doubt the sagacity of Judge Gannon's decision. The Court, therefore, finds that Plaintiffs are likely to succeed on the merits of their claims.

As Plaintiffs have shown the propriety of granting a TRO by succeeding on all four *Dataphase* factors, Plaintiffs' Motion for a Temporary Restraining Order is granted. The individual Defendants and members of the Defendant class shall be enjoined from enforcing Iowa Code § 692A.2A for the duration of the Order. This Order shall remain in effect until the Court rules on Plaintiffs' Motion for Preliminary Injunction. Oral

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[7] Although the State's case against Mr. Seering was dismissed, the Iowa Attorney General indicated the State's intent to appeal Judge Gamon's ruling. Accordingly, Mr. Seering is excluded from the Plaintiff class in this action.

argument on the Motion is scheduled for September 15 and 16th, 2003.

D. Security

Before the Court may issue a temporary restraining order to enjoin Defendants from enforcing § 692A.2A, Fed.R.Civ.P. 65(c) requires the party seeking injunctive relief to post a security bond "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." In requiring a security bond, Rule 65(c) furnishes financial security to the opposing party in the event the injunction is later deemed improper. *United States v. Onan*, 190 F.2d 1, 7 (8th Cir. 1951). The amount of the bond required lies within the sound discretion of the Court. *Rathman Group v. Tanenbaum*, 889 F.2d 787, 790 (8th Cir. 1989).

Defendants have no financial or personal interest in the outcome of this case. As noted above, there is no risk of harm to Defendants because of the Court's issuance of this temporary restraining order. The Court, therefore, finds that no amount shall be required as security from Plaintiffs before issuing the TRO. *See Kaepa Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) ("court 'may elect to require no security at all.'") (quoting *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2nd Cir. 1974) ("[T]he district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined.") (citations omitted); *Urban v. Knapp Bros. Mfg.*, 217 F.2d 810, 816 (6th Cir. 1954)

(no bond required where no material damage would ensue); *Onan*, 190 F.2d at 7 (district court did not error by not requiring bond where plaintiff could not have been damaged).

IV. ORDER

Plaintiffs' Motions to certify Plaintiff and Defendant classes in this action are **granted**. Plaintiffs' Motion for Temporary Restraining Order is also **granted**. No security bond shall be required from Plaintiffs before the injunction takes effect. The individually named Defendants and the members of the certified Defendant class of County Attorneys are hereby immediately enjoined from enforcing Iowa Code § 692A.2A until the Court rules on Plaintiffs' Motion for Preliminary Injunction.

IT IS SO ORDERED.

Dated this 25th day of July, 2003.

/s/ Robert W. Pratt
ROBERT W. PRATT
U.S. DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN DOE I, JOHN DOE II, and JOHN DOE III, on their own behalf and as representatives of the class of sex offenders in the State of Iowa	*	3:03-cv-90067
Plaintiffs	*	
v.	*	
TOM MILLER, Iowa Attorney General and J. PATRICK WHITE, Johnson County Attorney as representative of the class of all county attorneys in Iowa	*	MEMORANDUM OPINION AND ORDER
Defendants.	*	

Writing in dissent from an en banc panel of the Eighth Circuit Court of Appeals more than thirty years ago, former Chief Circuit Judge Donald Lay observed:

> The denial of due process in parole revocation simply mirrors society's overall attitude of degradation and defilement of a convicted felon.

> It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely resiricted and we react with sickened wonder and disgust when he returns to a life of crime.

Morrissey v. Brewer, 443 F.2d 942, 953 (8th Cir. 197) (en banc) (Lay, J., dissenting), *rev d*, 408 U.S. 471 (1972).

Societal attitudes towards convicted persons have changed little in the three decades since *Morrissey*. A convict who has served his or her sentence still faces the social stigmas and discrimination that Judge Lay described. Yet, in some instances, the crimes perpetrated by certain classes of offenders are so offensive to human dignity and so atrocious that many would be comfortable using any means necessary to prevent even the possibility of re-offense. The present case asks the Court to examine the limits of this supposition as the class of Plaintiffs represented includes those who society would deem among the most deplorable of offenders, those convicted of committing sexual offenses against minors. To

what extent, then, may the State go to protect its children from those whom it suspects might prey upon them?

Sex offenders are a serious threat in this Nation." *Connecticut v. Doe*, 538 U.S. 1,4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24,32 (2002) (plurality opinion)). "The victims of sex assault are most often juveniles." and "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Id.* (quoting *McKune*, *536* U.S. at 32-33).

In 2002, the State of Iowa responded to this threat by enacting Iowa Code § 692A.2A. The Act prohibits a person who has committed a criminal offense against a minor from residing within two thousand feet of a school or child care facility. Three named Plaintiffs initially brought this action against the Iowa Attorney General and a proposed defendant class consisting of all of Iowa's County Attorneys ("the State"). Plaintiffs' Complaint asks the Court to declare § 692A.2A unconstitutional on a number of theories, and Plaintiffs further request that the Court permanently enjoin the State from enforcing the law. By Order dated July 25, 2003, the Court certified this action as a class action. The Plaintiff class includes all individuals defined as a "person" by Iowa Code § 692A.2A(l), currently living in the state of Iowa, or who might wish to live in the state of Iowa, and excluding those individuals currently being prosecuted under Iowa Code § 692A.2A in the Iowa state courts. The Court also certified Plaintiffs' proposed Defendant class, which includes all ninety nine of Iowa's County Attorneys, with J. Patrick White, the Johnson County Attorney, serving as class representative. Upon certifying both Plaintiff and Defendant classes, the

Court granted Plaintiffs' motion to temporarily enjoin enforcement of Iowa Code § 692A2A until the Court ruled on Plaintiffs' motion for a preliminary injunction. The parties, however, agreed to forego a preliminary injunction hearing and to proceed directly to trial with Defendants consenting to the Court's injunction remaining in effect throughout the litigation process.

Plaintiffs' challenge to Iowa Code § 692A.2A is that the law infringes upon a number of constitutional rights, including Plaintiffs' substantive due process rights of family privacy and freedom to travel, the Fifth Amendment right against self-incrimination, the Eighth Amendment's guarantee against cruel and unusual punishment, and the right to procedural due process. Plaintiffs further contend that Iowa Code § 692A.2A is an unconstitutional ex post facto law when applied to those class members who committed their crimes before July 1,2002. Defendants counter that the Act is a lawful exercise of the State's police power and a constitutional effort to protect children from dangerous individuals. The Court heard testimony and received evidence from both sides during a two-day bench trial on December 15 and December 16, 2003. At the Court's behest, both sides filed post-thal briefs on Januaiy 9, 2004, and the matter is now fiilly submitted. Pursuant to Federal Rule of Civil Procedure 52(a), the Court now sets forth its findings of fact and separate conclusions of law thereon as detailed below.

1. FINDINGS OF FACT

1. Iowa Code § 692A.2A

On May 9,2002, Iowa Governor Thomas Vilsack

signed Senate File 2197 into law. Effective July 1.2002. Senate File 2197, now codified at Iowa Code § 692A.2A, states in full:

692A.2A Residency restrictions — child care facilities and schools.

1. For purposes of this section, "*person*" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.[1]

2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.

3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.

4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section

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[1]Within the definition of person in § 692A.2A (1), the terms "criminal offense against a minor," "aggravated offense," "sexually violent offense," and "other relevant offense" are specially defined. *See* Iowa Code § 692A.1 (1), (5), (7), and (9).

if any of the following apply:

a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.

b. The person is subject to an order of commitment under chapter 229A.

c. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.

d. The person is a minor or a ward under a guardianship.

Where applicable, the Act restricts the area in which a person may reside to places that are not within two thousand feet from a school or child care facility.[2] Residence is defined

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[2]Laws restricting where sex offenders may live are relatively new and somewhat unique in other jurisdictions. Twelve states other than Iowa have enacted some form of residency restriction applicable to sex offenders. *See* **Alabama**, Ala. Code § 15-20-26 (1999) (restricts sex offenders from residing or accepting employment within 2000 feet of school or child care facility); **Arkansas**, Ark. Code Ann. § 5-14-128 (2003) (unlawful for level three or four sex offenders to reside within 2000 feet of school or daycare); **California**, Cal. Pen. Code § 3003 (as amended 2003) (parolees may not live within 35 miles of victim or witnesses, and certain sex offenders on parole may not live within a quarter mile from a primary school); **Florida**, Fla. Stat. Ann. § 947.1405 (7)(a)(2) (released sex offender with victim under eighteen prohibited from living within 1,000 feet of a school,

as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory." Iowa Code § 692A. 1(8). As the restriction is limited to one's residence, §692A.2A does not otherwise prohibit an individual's presence within the restricted zone; affected persons are free to travel, work, or generally move about within any area. The Act contains no time frame regarding when a person committed his or her crime, but does include a limited "grandfather clause," whereby an individual who has established a residence prior to July 1, 2002 is exempted from the area restrictions. *See* Iowa Code § 692A.2A(4)(c). The text of § 692A.2A also indicates that sex offender who

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day care center, park, playground, or other place where children regularly congregate); **Georgia**, GA. Code Ann. § 42-1-13 (2003) (sex offenders required to register shall not reside within 1,000 feet of any child care facility, school, or area where minors congregate); **Illinois**, 720 Illinois Comp. Stat. § 5/11-9.3 (b-5) (as amended 2000) (child sex offenders prohibited from knowingly residing within 500 feet of schools); **Kentucky**, Ky. Rev. Stat. Ann. § 17.495 (2000) (registered sex offenders on supervised release shall not reside within 1000 feet of school or child care facility); **Louisiana**, LA. Rev. Stat. § 14:91.1 (sexually violent predators shall not reside within 1000 feet of schools unless permission is given by school superintendent); **Ohio**, Ohio Rev. Code Ann. § 2950.031 (2003) (sex offenders prohibited from residing within 1000 feet of school); **Oklahoma**, 57 Okl. Stat. § 590 (2003) (prohibits sex offenders from residing within 2000 feet of schools or educational institutions); **Oregon**, Or. Rev. Stat. § 144.642, 144.643 (incorporates general prohibition on supervised sex offenders living near places where children reside); **Tennessee**, Tenn. Code. Ann. § 40-39-111 (2003) (sex offenders prohibited from establishing residence within 1000 feet of school, child care facility, or victim).

establish legal residence residences after July, 1 2002 will be exempted from new restricted areas caused by the creation of a new school or child cam facility after the effective date. *See id.* Finally, §692A.2A gives no indication as to how long the restriction will apply to any given individual.

B. Child Care Facility

"Child care facility," as the term is used in § 692A.2A, is defined at Iowa Code § 237A.1. Iowa Code § 692A.1(2). Under §237A.1, a child care facility is "a child care center, preschool, or a registered child development home." Iowa Code § 237A.1(5). The same code section defines a "child care center" as "a facility providing child care or preschool services for seven or more children, except when the facility is registered as a child development home," and "preschool" as "a child care facility which provides to children ages three through five, for periods of time not exceeding three hours per day, programs designed to help the children to develop intellectual skills, social skills, and motor skills, and to extend their interest and understanding of the world about them." Iowa Code § 237A.1(4), (13). A "child development home" is "a person or program registered under section 237A.3A that may provide child care to six or more children at any one time." Iowa Code § 237A.1(7).

Currently, the only available list of child care facilities is a database maintained by the Iowa Department of Human Services ("DHS"). Plaintiffs' witness Jodi Caswell, a DHS administrator responsible for overseeing the registration of child development homes, explained that the database is maintained at the state central offices and is not published. Plaintiffs' contend that they received a copy of the list only after filing an open records request and paying a seventy dollar fee.

Ms. Caswell testified that the central database is updated daily. Ms. Caswell further explained that the turnover rate for child care facilities is frequent and could be high. Plaintiffs produced database reports from 2002 and the most current 2003 database to show the extent to which the database can change over a given year. (Plaintiffs' Ex. 60 - 61). The 2002 list contains 7462 daycare locations and is 258 pages long. (Plaintiffs' Ex. 60). Although the 2003 database lists only 7172 locations, 1921 of these are new from the 2002 database. (Plaintiffs' Ex. 61). In several instances, the listings contain no physical address or only a post office box number, but Ms. Caswell testified that an applicant is supposed to provide a physical address.

As Ms. Caswell testified, registering as a child development home requires an individual to meet certain requirements and to complete a one page application. At the most basic level, an individual can apply to register as a Category A child development home, so long as the applicant is at least eighteen years old, provides three letters of reference, and has a smoke detector and fire extinguisher in the house. *See* Plaintiffs' Ex. 48. DHS also conducts criminal background checks on the applicant, employees, and any person over the age of fourteen living in the home. There is no fee for the application and the registration is valid for two years.

C. Implementation of Iowa Code § 692A.2A

John Werden, the Carroll County, Iowa, county attorney testified for the State on the steps taken to implement § 692A.2A in his county. Werden stated that after reviewing the Act, he contacted the Carroll County information technology department and asked them to produce maps generally locating the county's schools and child care

facilities. To produce the maps, Werden explained that the county utilized a Geographic Information Systems ("GIS") system, ordinarily used by the county for tax assessment purposes, to input the locations of schools and child care facilities. County officials then manually selected parameters and defined the two thousand foot buffer areas around the locations. The maps are continuously updated as locations are added or removed from the database.

Werden conceded that the maps produced were not accurate to the foot because of at least two variables. First, Werden explained that the GIS system relies on aerial photographs to establish geographic layers and to pinpoint given locations. Once the locations were established from the GIS system, a question arose regarding where to place the origin of the two thousand foot circles; circles could either be drawn based on the outer perimeter of a school or child care facility's property boundaries or from the center of the property. Werden testified, however, that the maps his office provided to local law enforcement "were not meant to be to exact scale," but "a reasonable way to provide general guidance."

In addition to the difficulties with scaling accuracy as described above, the map produced by Carroll County also failed to accurately reflect the locations of all schools and child care facilities in the county. As Werden admitted at trial, a daycare center in the town of Breda was mistakenly omitted from the maps produced for law enforcement and for trial. After correcting the map to reflect the location, the entire town was encompassed by a restricted area.

Plaintiffs also presented the Court with maps from numerous jurisdictions throughout Iowa other than Carroll County. Plaintiffs noted, however, that not all counties or

jurisdictions have created maps showing restricted areas. Plaintiffs indicate that, among others, no maps exist for the cities of Cedar Rapids, Davenport, Burlington, Newton, or Fort Dodge. In other counties, the responsibility for developing maps has been delegated to the towns and cities within the county. Plaintiffs used as an example, Johnson County, where no countywide map exists. Rather, maps from towns in Johnson County were prepared by the Iowa City and Coralville police departments. Although the evidence indicates that not all jurisdictions that have created maps did so in the same fashion as Carroll County, the specific processes used to create each map is not clear..

Lieutenant Ronald Wenman of the City of Coralville Police Department testified about the process of implementing and enforcing § 692A.2A in that town. Wennian stated that when the Act was first enacted, he researched it as best he could and attended a training seminar conducted in Des Moines by the Iowa Department of Criminal Investigation. Wenman also assumed the responsibility for attempting to map the city of Coralville to identify restricted areas. In going about the process, Wenman explained that he had personal knowledge of where public schools and commercial daycare centers were located, and that he obtained a list of registered child care facilities from DHS to supplement his knowledge. Wenman provided this information to the city engineering department which then overlaid two thousand foot circles around each of the locations.

Notice of the change in law was provided to sex offenders by the Iowa Department of Public Safety, Division of Criminal Investigation. As Defendants' witness Joanne Tinker, the public service supervisor overseeing the sex

offender registry, testified, notices were generated directly from the sex offender registry database and were sent to the registrant's last home address, regardless of whether the offender's victim was a minor. The notices included a portion of the text of § 692A.2A, but did not state whether the registrant was subject to the residency restriction described therein. As well, the notice did not include the exemptions to the restriction contained in the Act.

D. Effect of Iowa Code § 692A.2A on Housing

Both parties presented evidence and testimony to detail the significant effect that Iowa Code § 692A.2A has had on available housing for those offenders covered under the law. Perhaps most compelling are the maps detailing the restricted areas in various jurisdictions. In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. *See* Plaintiffs' Ex. 9a, 11a. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or child care facility, the entire town is often engulfed by an excluded area. *See* Plaintiffs' Ex. 12b-12h. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher, and Tiffen are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or child care facility remain available, as does the country, but available housing in these areas is not necessarily readily available.

Carroll County Attorney John Werden testified about the effect that § 692A.2A has had on housing in his county. As Werden explained, and a map of Carroll County shows, the majority of Carroll County remains available for sex

offenders. The large majority of this area, however, is unincorporated farmland. Cities and towns in Carroll County follow the same pattern as those in the rest of the state. The City of Carroll, with a population of just over ten thousand, is all but completely blocked off. There are small areas around the edge of town that are not restricted, but Werden testified that only the areas to the north and south of town have residences. Certain small towns such as Halbur and Breda are completely restricted while other small towns without schools or child care facilities are completely available; the difference typically being the presence of one restricted location. The town of Breda appears completely available on the map, but Werden explained that this was a mistake. The town, in fact, has a registered private daycare center. With the error corrected, the town of Breda is entirely restricted from persons covered under § 692A.2A.

Werden also provided actual numbers of housing that remains available in Carroll County for affected sex offenders. The housing statistics provided do not indicate whether units are rental properties or owner occupied, nor do they state the number of vacancies. In defining a residential unit, Werden explained that any dwelling was included, such that an apartment complex with four apartments would be counted as four units.

Defendants' Exhibit WC shows that of 9019 residential units in Carroll County, 6942 units are inside restricted zones and 2077, or twenty three percent, of housing units are not in restricted areas. Of the 2077, however, all but 383 residential units are in unincorporated areas. Werden conceded that the units in the unincorporated areas are mainly farmhouses, but noted that the trend towards larger farms has created some vacancies where the one who lives in the

farmhouse no longer farms the land. Of the remaining 383 units, 244 are located in towns without a school or child care facility, leaving 139 possible housing units for sex offenders who want neither to live in a town so small that it has no services, nor in an unincorporated area. As a result, in towns and cities in Carroll County that are not completely available or completely restricted, barely two percent of housing is available to persons to § 692A.2A.

E. Sex Offenders

As of December 1, 2003 there were approximately 5674 sex offenders registered in the state of Iowa. (Defendants' Ex. WA).[3] Of the victims attributed to these offenders, 5073, or eighty three percent, were under the age of eighteen.[4] *Id.* By far, the largest percentage of victims are females ages eleven to seventeen, with 2812, or 45.9 percent of total victims. Six to ten year old females rank as a distant, but disturbing, second with 1065 victims or 17.4 percent of all victims. *Id.* The statistics show that anyone of almost any age could be either the victim of a sex offender or the perpetrator of a sex offense. The average age for offenders is twenty three years old; female victims average thirteen and male victims average a mere eleven years old. *Id.* The youngest victims in

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[3]Defendants' witness Joanne Tinker explained that approximately 800 of the registered sex offenders reside out of the State.

[4]Defendants' Ex. WA actually lists 7796 total victims. Of these, however, 1679 are classified as "sex not listed." The exhibit goes on to provide information on male and female victims in a given age range, but does not include information where the sex is not listed. Excluding these victims then, the number of victims for which the Court was provided demographic information is 6117.

Iowa have not even reached their first birthdays.

Plaintiffs presented testimony and affidavits at trial from sixteen sex offenders, the wife of one of the sixteen, and the mother of a seventeenth offender. As in the Court's previous Order, the Court shall refer to the Plaintiff class members using the John Doe pseudonyms assigned by Plaintiffs' counsel.

1. **John Doe I** successfully completed probation after being convicted of second degree sexual assault under Wisconsin law in 1994 for having consensual sex with a girl who was fourteen years eleven months old when he was eighteen years and two months old. Under Iowa law, John Doe I's actions would not constitute a crime[5], but he was nonetheless required to register as a sex offender when he moved to Iowa to attend the University of Iowa. He is not listed on the online Iowa Sex Offender Registry ("ISOR").[6]

John Doe I currently resides in Johnson County, Iowa, in an apartment that is within the restricted zone under § 692A.2A. John Doe I originally signed a lease for an apartment prior to July, 1, 2002 and was exempted under § 692A.2A (c)(4). On August 1, 2003, John Doe I moved into a new apartment in the same apartment complex. Upon so doing, he was initially told that the move might be considered a change of address that would require him to re-register and

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[5]Pursuant to Iowa Code § 709.4 (2)(c)(4), where the younger party is fourteen or fifteen, third degree sexual abuse occurs only where the other party is more than four years older.

[6]The online Iowa Sex Offender Registry lists only those persons who have been assessed as moderate or high risk for re-offense. *See* Iowa Code § 692A.13(3)(c); http://www.iowasexoffender.com.

lose his exempt status. In September 2003, however, the Johnson County Attorney informed him that the new apartment would also be exempted under the grandfather clause.

2. **John Doe II** pleaded guilty to third degree sexual abuse in August 2002 for having consensual sex with a fifteen year old girl when he was twenty years old. During the fall of 2002, John Doe II lived in a halfway house in Johnson County, Iowa. To be released from the halfway house, John Doe II was required to secure a residence that was acceptable to his counselor and parole officer. John Doe II had difficulty finding housing that complied with § 692A.2A, and he remained in the halfway house for longer than otherwise necessary until he found suitable housing in November 2002. John Doe II was evicted from this apartment in April 2003 because of problems with rent. He began looking for another residence, but had difficulty finding housing that was both within his budget and in compliance with the two thousand foot restriction. In searching for housing, John Doe II was assisted by Margie Stanton of the Johnson County Sheriff's Department, who would advise him on whether a given location was outside of a restricted area. Even with this assistance, John Doe II was unable to find legal housing in part because of the two thousand foot restriction and in part because of his own credit problems. John Doe II currently resides in Johnson County, Iowa at a location that would be in violation of § 692A.2A but for the Court's injunction. He remains on probation, and his probation officer is aware of his current living situation. The online ISOR lists John Doe II as a moderate risk for re-offense.

3. **John Doe III** was released from prison in July 2000

after serving nearly half of a ten-year sentence for third-degree sexual assault. He is listed on the ISOR as a moderate risk to re-offend. John Doe III owns a home in Davenport, Iowa but he has had a difficult time making his mortgage payments in large part because employers have been unwilling to retain him upon learning of his criminal history. John Doe III is engaged to a woman who owns a home in Clinton County, Iowa where she lives with her two minor children. John Doe III would like to live with his fiancee in her home, but would be unable to do so under § 692A.2A because the house is within a restricted area.

4. **John Doe IV's mother** testified about her efforts to find her son legally acceptable housing after he received parole on June 10, 2003. John Doe IV was in prison because of multiple drunk driving offenses. He is subject to the restrictions of § 692A.2A because of a 1992 offense against a minor that was adjudicated in juvenile court because John Doe IV was fourteen years old at the time. When her son received parole, John Doe IV's mother had intended that he come live with her in Mason City, Iowa. Before he could leave prison, however, John Doe IV had to have an approved place to live, and his mother's house was within a restricted area. John Doe IV's mother worked with his parole officer to find him a place to live, but learned that most of Mason City was restricted. She did try to find him a place at two locations that she was told about, but was unable to find any vacancies. John Doe IV was paroled to his mother's house after the Court entered its injunction. John Doe iv has since absconded.

5. **John Doe VI** pleaded guilty to the charge of sexual abuse in the second degree in 1992 and was sentenced to twenty-five years in prison. While in prison, John Doe VI completed the sex offender treatment program and was

paroled to Polk County, Iowa in February 2002. John Doe VI remains on supervised parole until 2005, and he currently participates in after care sex offender treatment. His risk status on the ISOF is high.

John Doe VI began looking for a house to purchase for himself and his elderly and infirm mother in January 2003. He found a home within the city limits and measured the distance from the house to the two nearest schools with his car odometer. Believing that the house was not within a restricted area, he checked with the Des Moines Police Department and was told that the address complied with § 692A.2A. About six weeks after John Doe VI and his mother moved into the house on April 1,2003, his mother received a call from the Des Moines Police Department Sex Offender Division stating that John Doe VI would have to move out as the house was actually within two thousand feet of a school. John Doe VI found and moved to a legally acceptable apartment in a Des Moines suburb, but was unable to maintain payments on both the apartment and the house. After being forced to move from his house, John Doe VI suffered a heart attack and incurred substantial medical bills in addition to the two housing payments. Shortly before the Court enjoined enforcement of § 692A.2A, John Doe VI was told to move out of the apartment as the owner did not want to rent to a sex offender. Upon issuance of the injunction, John Doe VI moved back into the house he had purchased with his mother. He states that if § 692A.2A is allowed to stand, he will have to sell the house as he can not afford two housing payments.

6. **John Doe VII** lives with his wife, their two children, and his mother-in-law in a two bedroom apartment in rural Linn County, Iowa. He must register as a sex offender in Iowa because he was convicted of the crime of indecent liberties

with a child under Kansas law.[7] As with John Doe I, John Doe VII's actions would not have been criminal under Iowa law. The ISOR lists John Doe VII as a moderate risk to re-offend.

John Doe VII's wife gave birth to their second child in early December 2003. Shortly before the new arrival, his wife's mother also moved into their apartment for financial reasons. The apartment is too small for the family and John Doe VII wishes to move to make room for everyone. John Doe VII states that he has investigated as many as forty locations in Cedar Rapids, Iowa, but none are beyond two-thousand feet from a school or child care facility. The Linn County Sheriff's Department will not provide John Doe VII with a list of places to live in Cedar Rapids, but claim that they know of a few places on one side of town. The Sheriff's Department will not tell John Doe VII where these places are, and he has been unable to find a legally acceptable residence. Because of his crime, John Doe VII's probation officer does not want him living next to a high school, but has no problem with John Doe VII living near a daycare center.

7. **John Doe VIII** was convicted of the aggravated misdemeanor of sexual exploitation of a minor under Iowa Code § 728.12(3) for possessing improper pictures from the internet. Because his crime involved an offense against a minor, John Doe VIII is subject to the residency restriction of § 692A.2A. John Doe VIII is classified as a high risk to re-offend.

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[7]The statutory crime of indecent liberties with a child, Kan. Stat. Ann. §21-3503 replaced what was commonly known as statutory rape. State *ex rel Hermesmann v. Seyer*, 847 P.2d 1273, 1276 (Kan. 1993).

John Doe VIII attempted to find legal housing in the Iowa City area, but was unable to find anything that he could afford. He did find one possible location, but his application was denied because of his criminal record. After unsuccessfully searching for housing, John Doe VIII moved into his parents' home with the consent of his probation officer though the home was in a restricted area. He lived with his parents in Iowa City until his recent move to another city with his girlfriend. This new residence is also within two thousand feet of a school or child care facility. John Doe VIII was charged with assault and driving under the influence in fall of 2003, and he expects that he will be sent to prison once he is sentenced for these crimes.

8. **John Doe IX** was also convicted under Iowa Code § 728.12(3) for downloading inappropriate material from the internet that involved minors. After being placed on probation for two years in June 2003, John Doe IX registered with the Johnson County Sheriff's Department and was given a list of four apartments that would be legally acceptable. John Doe IX looked into each of the four apartments, but learned that none of the listings had any current openings. He is currently living with his wife in an apartment that would be in violation of § 692A.2A but for the Court's injunction, and he states that he does not know where he would find a place to live if the law were upheld. John Doe IX is not listed on the online ISOR.

9. **John Doe X** was convicted of a serious misdemeanor for violating Iowa Code § 709.14, lascivious conduct with a minor. John Doe X has been discharged from probation and is not included on the published list of sex offenders because he is classified as a low risk to re-offend.

John Doe X and his wife both receive Social Security

disability payments because of mental retardation and mental illness. John Doe X has no regular employment, but he occasionally finds work through government-sponsored work groups. As John Werden, the Carroll County Attorney, confirmed at the July 14 hearing, John Doe X cannot live anywhere in the City of Carroll because of the 2000 feet restriction. To comply with the two thousand foot restriction then, John Doe X moved to an apartment complex outside of Carroll, Iowa that is substantially more expensive than any apartment he could have obtained in town. Since moving, his mental and physical health have deteriorated. Because of the restriction, John Doe X was unable to obtain some subsidized housing otherwise available for mentally disabled individuals.

10. **John Doe XI** has lived at his parents' house in Cedar Rapids, Iowa since before July 1, 2002, and is exempted from § 692A.2A so long as he remains there. In addition to their adult son, however, John Doe XI's wife and John Doe XI and his wife's fifteen month old daughter and six month old son also live in his parents' house. As might be expected, the stress on all parties has been great. John Doe XI and his wife have searched for a new residence but were unable to find an apartment that was either not in a restricted area or that would accept John Doe XI given his criminal history. John Doe XI and his wife eventually purchased a house that is within two thousand feet of an elementary school. John Doe XI's probation officer has no objection to him living in the house save for § 692A.2A. John Doe XI was convicted of committing lascivious acts with a thirteen year old girl in August 2000. He is classified as a high risk to re-offend.

11. **John Doe XII** pleaded guilty to an aggravated misdemeanor charge of assault with intent to commit sexual abuse in Johnson County, Iowa in 2001. At the time of the

offense, both John Doe XII and his victim were seventeen years old. He successfully completed two years of probation in August 2003 and is classified as a low risk to re-offend. He is not listed on the online ISOR.

John Doe XII is a student at a college in Iowa. During his freshman year in 2001 and 2002, he lived in the school dormitories with the consent of his probation officer as § 692A.2A had not yet gone into effect. He relied on grant money to cover the cost of his room and board while at school. John Doe XII returned to his parents' house the following summer and was living there when § 692A.2A went into effect. When he returned to school in August 2002, he was told that he could no longer live in the dorms because of a nearby child care facility. Unlike John Doe I, the fact that John Doe XII had signed a housing contract prior to July 1, 2002 was of no consequence. John Doe XII was also told that living in the dorms during his freshman year did not qualify him for exempt status under § 692A.2A(4)(c).

When he was told that he could not live on campus, John Doe XII returned to his parents' home, but continued to attend school full time. As he was not living in the school dorms, he was no longer eligible for grant or scholarship money to cover his room and board. Instead, John Doe XII made a two hour daily commute to attend classes, yet was still able to maintain over a 3.5 grade point average. Once the Court enjoined enforcement of § 692A.2A, John Doe XII moved back into the school dormitories and his housing scholarship was reinstated.

12. **John Doe XIII** pleaded guilty to the class D felony of lascivious acts with a child in 2000 for offenses against his six year old stepdaughter. He completed two different sex offender programs, was released from probation in August

2002, and is classified as a low risk to re-offend. John Doe XIII was living in Black Hawk County, Iowa when § 692A.2A went into effect. Although he was exempt from the residency restriction at the time under the grandfather clause, he was not able to afford the rent at that location and moved out. John Doe XIII looked for a more affordable residence in Black Hawk County but was unable to find anything that complied with the two thousand foot restriction. He, therefore, moved out of Iowa to his parents' home in Indiana, where he has lived since. His parents have now moved to Missouri, and John Doe XIII would like to return to Iowa, but is unable to find a place in Black Hawk County that would comply with § 692A.2A.

13. **John Doe XIV** pleaded guilty to a serious misdemeanor charge in 1995 when he was nineteen after exposing himself at a party where a thirteen year old girl was present. Because of his crime, he was required to register as a sex offender for ten years. After successfully completing two years of probation and a sex offender class, John Doe XIV is not considered a risk to re-offend, and he is not listed on the online ISOR.

John Doe XIV is now married and has two children, the second of which was born in September 2002. In the summer of 2002, John Doe XIV and his wife began looking for a larger place in Waterloo, Iowa in anticipation of the new baby. Although John Doe XIV had received a notice regarding the two thousand foot residency restriction, he mistakenly disregarded it because he did not think that it pertained to him. Instead, he and his wife found a house with shade trees on the street that they thought their daughter would love because of the elementary school playground around the corner. After moving into the new house on

August 1, 2002. John Doe XIV registered the new address at the local sheriff's office as required by law. Upon so doing, he was told that he could not live in the house because of § 692A.2A's residency restriction and that he would be arrested if he did not move. John Doe XIV returned to the sheriff's office the next day to consult a map and learned that the only locations not restricted by § 692A.2A were in a very exclusive and high priced neighborhood. He then spent the next two months looking for a place in or around the Waterloo area. When nothing was found, John Doe XIV and his wife ended up financing one hundred percent of the cost of a house in a rural area about forty five miles from Waterloo. Because of the move, John Doe XIV now commutes an hour each way to work every day, and the family rarely sees their friends and family from the Waterloo area. John Doe XIV explained that the move was particularly hard on his four year old daughter, and that she often asks about moving back.

14. **John Doe XIV's wife** also testified about the effect of § 692A.2A on her and her family. Because of the residency restriction that her husband must abide by, she was forced to quit her job in Waterloo. She now works two jobs, but makes less than she did with her previous job. As there are no child care facilities near their home, John Doe XIV's wife must drive sixteen miles each way to take their two young children to a daycare center so that she can work to afford the housing payments. To remain with her husband and family she had to leave her own family and friends in the town she had lived her entire life. She explained that the stress caused by looking for a new place and abiding by the residency restriction while in the final months of her second pregnancy was immense and sometimes made her depressed and hysterical.

15. **John Doe XV** was serving a twenty five year sentence

for the second degree sexual abuse of his former girlfriend's then ten year old daughter until he received a work release in May 2003. After completing the work release program, he was paroled in October 2003 to his mother's house. As his mother's house is within two thousand feet of a school, he would not have received the parole but for the Court's injunction. John Doe XV has purchased a trailer of his own and wishes to move there, but will be unable to under § 692A.2A because the trailer court where the trailer is located is within a restricted area. John Doe XV is considered a moderate risk to re-offend.

16. **John Doe XVI** appears on the sex offender registry because he had consensual sex with a thirteen year old girl when he was eighteen. He is classified as a high risk to re-offend. When § 692A.2A went into effect, John Doe XVI was living in a small one bedroom apartment with his pregnant girlfriend. When the child was born in August, 2002, John Doe XVI's father helped him purchase a condominium on the outskirts of Coralville, Iowa. After the Court entered its injunction, John Doe XVI and his family moved from the condominium into his childhood home. As the house is within a restricted area, he would not be able to remain there if the injunction is lifted.

17. **John Doe XVII** is not a member of the Plaintiff class as he is currently being criminally prosecuted for a violation of § 692A.2A. *See* July 25, 2003 Order § II(A)(5). John Doe XVII pleaded guilty to two counts of sexual abuse in the third degree in 1994 and was sentenced to twenty years in prison. He is classified as a high risk to re-offend. John Doe XVII was released from prison in June 2003. The prison notified the Webster County Sheriff's Department of John Doe XVII's intended address forty five days prior to his release, and the

Sheriff's office raised no concerns at that time. After he was discharged from prison, John Doe XVII registered his new address with the Webster County Sheriff, but states that he was not told that the residence was within a restricted area though a daycare center was located in a nearby church. Within two weeks after registering his new address, John Doe XVII was arrested for violating the two thousand foot residency restriction of § 692A.2A. He is currently awaiting trial on the charge.

18. **John Doe XVIII** was convicted of lascivious acts against a minor for offenses against his stepdaughter. He completed the sex offender treatment program at Mt. Pleasant, Iowa and was given a work release by the board of parole in January 2003. He is classified as a high risk to re-offend.

John Doe XVIII desired to live with his adult son upon his release from prison, but was unable to because his son lives within two thousand feet of a school. After completing the work release program, John Doe XVIII moved to the county to comply with § 692A.2A. He believes that he would have received a parole rather than work release had he been able to live with his son. John Doe XVIII suffers from a number of serious medical problems, and he is concerned about living in the country where he does not have convenient access to a hospital and medical treatment.

F. Expert Witness Testimony on Treatment, Restriction, and Supervision of Sex Offenders

1. Dudley Allison

Dudley Allison, an Iowa Department of Corrections parole and probation officer in Johnson County who specializes in the supervision of sex offenders, testified for

the State. Mr. Allison holds a bachelor's degree in psychology and has been involved in training sessions for sex offender treatment. He does not consider himself a scientist, and he has done no clinical research on the treatment of sex offenders. From 1984 until the fall of 1996, Allison was a sex offender treatment manager at the Mount Pleasant Correctional Facility in Mount Pleasant, Iowa. During this time, he helped to develop and supervise the prison's sex offender treatment program. As a treatment manager, Allison facilitated group therapy and other treatment sessions for sex offenders.

Mr. Allison explained that when he worked at Mount Pleasant, treatment for sex offenders focused first on the individual offender acknowledging his or her past behavior and fighting through the minimizing, rationalizing, and excuses the offender relied on to justify the behaviors. Once the offender could acknowledge that his or her behavior was inappropriate, a relapse prevention plan was established to identify dangerous situations so the offender could, in the future, avoid the circumstances that led to the original offense. Both while offenders are incarcerated and once they are released, they participate in group and individual therapy sessions. As Allison explained, "sometimes an offense may be more of a situational thing, other times it may be almost a life long pattern of behavior; we have to consider that individually."

In his position as a parole and probation officer, Allison testified that he prepares risk assessments for the Department of Corrections. In so doing, he ranks individuals as a low, moderate, or high risk for re-offense based on a number of factors. Polygraph and plethysmograph tests are

also used in the assessment process.[8] As noted above, low risk individuals are subject to fewer community notification requirements and do not appear on the ISOR website.

Allison testified that, as a parole and probation officer, he has the ability to place restrictions and limitations on the activities of the offenders he supervises. When crafting restrictions, Allison explained that he tries to have offenders avoid "dangerous situations," which depend on several variables defined by the individual offender such as the type of offense, the risk assessment, victim choice, and others. Allison noted that just as the variables differ based on the individual offender, restrictions and limitations would also be individualized to address the specific needs of a given offender. He provided the example of twenty year olds with fourteen and fifteen year old girlfriends. These men have committed sexual offenses against minors, but Allison stated that he did not find these people to be specifically dangerous to young minors. For other offenders, Allison testified that he might not want an offender working in a toy shop or spending his days staring at a playground or school across the street.

Mr. Allison opined that, based on his training and experience, he believes that there is a legitimate public safety concern regarding where sex offenders live. He testified, however, that as a parole and probation officer, he was able to deal with dangerous situations without § 692A.2A. As well,

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[8]As used in this setting, a plethysmograph is a device that measures changes in the circumference of the penis. During the test, a cuff, which Allison referred to as a "strain gauge," is placed around the subject's penis and any change in circumference is noted while the subject is presented with materials depicting various sexual scenarios, both appropriate and otherwise.

Allison admitted that placing sex offenders into residences designed to implement a particular offender's parole or probation plan would be easier without the Act. Allison explained that, when considering restrictions for an offender, he was more concerned with the circumstances and situation into which the individual was being placed than he was with a specific distance. When asked about any concerns he had about potential problems that could arise if a number of sex offenders begin living in the same apartment complex or residence, Allison replied, "if you put individuals together with like interests, and those interests are negative or deviant, then potentially they could be negative influences on each other."

2. Dr. William McEchron

The State introduced the transcript of Dr. William McEchron's expert witness testimony from a hearing on criminal defendant Keith Seering's motion to dismiss for failure to state a constitutional claim, in the Iowa District Court for Washington County. Defendants' Ex. MB. Dr. McEchron holds a Ph.D. in educational psychology from the University of Iowa, and maintains an office in Davenport Iowa. His general practice includes seeing a variety of clients, including adults, children, and families, as well as doing work for custody evaluations. According to Dr. McEchron, "the majority of the practice is with people who have...life's problems, depression, anxiety, that soft of thing." Defendant's Ex. MB at 27. He also testified that he sees "a lot of sex offenders" and that his work in this area includes group therapy, evaluations for private attorneys, and occasional Court evaluations for sentencing and risk assessment purposes.

According to Dr. McEchron, sexual offender behavior

is not classified as a mental illness,
but rather as a disruptive behavior. As did Mr. Allison, Dr. McEchron testified that a common element in the treatment of sex offenders is to first make them aware that they have done something wrong. Once this step is accomplished, treatment begins to focus on relapse prevention. The process of relapse prevention, Dr. McEchron explained, involves getting sex offenders to understand why they committed the offense. The process "varies from person to person," and "there are probably very few common elements." *Id.* at 37. He also identified "opportunity, knowing what the issues were in the person's life" as another component of relapse prevention, noting, for example, that re-offense can happen "during a particularly stressful time in their lives." *Id.* at 38.

When asked if there is a cure for sex offenders, Dr. McEchron answered "no," and went onto explain that, although there are some types of individuals with which they have had "a great deal of success" and "some that we feel very positive about", "there are never any guarantees that they might not re-offend." *Id.* at 29. Other individuals cause a much greater level of anxiety because they are prone to "a lot higher degree of re-offending." *Id.*

Dr. McEchron testified that he believed it is appropriate to place restrictions on sex offenders who are in his treatment and also under the supervision of the Department of Corrections. He explained that such restrictions are a "combined effort" that consists of a therapeutic component for which he is responsible, and issues of supervision and accountability in terms of following Court orders, for which the Department of Corrections is responsible. Finally, this combined effort also includes "what we feel is best for that individual — to be successful in the

future and to not re-offend." *Id.* at 30. Reasonable restrictions might include restricting a sex offender's access to children, "particularly if that's an issue," but Dr. McEchron went on to explain that "we can't say that all sex offenders offend against children, but certainly we're very concerned about their welfare, and you also have to define, you know, the age of the children, the relationship to the offender and so on." *Id.* at 31. Because there "were very high rates of re-offense for sex offenders who had offended against children," Dr. McEchron testified that he believed it would be appropriate to restrict places where sex offenders might come into contact with children if their victims were children. Dr. McEchron stated that the appropriateness of such a restriction is "common sense," although there is not sufficient data to allow them to know "where to draw the marks." *Id.* at 32. "Ideally, you would want to have most, if not all, the restrictions, lifted from a person before they're off of parole or probation to see how the offender does while there are still people involved in his life to keep an eye on him and see how he does in the real world." *Id.* at 39.

According to Dr. McEchron, removing restrictions would require "some judgment," and that 'there's experience on the part of, particularly, the parole officers who use some judgment in terms of how can they let go of some of those restrictions." *Id.* He stated that the goal is to have the person be self-restrictive, which involves starting off with appropriate restrictions and then educating the individual on how to avoid high-risk situations. He identified "opportunity" and "temptation" as the main elements that create a serious risk of re-offense when an offender finds himself around children, but Dr. McEchron identified the biggest risk as "what's going on inside the individual." *Id.* at 33-34. He

explained that, "we have a real hard time controlling what's in a person's head and in their heart. That has to be their responsibility in the end." *Id.* at 34. Dr. McEchron agreed that controlling the opportunity and temptation to re-offend is the probable aim of restrictions that limit an offenders access to children and that reducing opportunity and temptation is extremely important to treatment.

When questioned about the factors that go into assessing the dangerousness of sex offenders or the likelihood of their re-offense, Dr. McEchron said such factors would include prior history, prior criminal history, the number of offenses, the number of sexual offenses, the victims age, the victim's sex, the relationship to the victim, whether alcohol was involved, and whether mental illness was involved. He testified that he had not seen a variable that consists of the distance that one resides from a school or day care, nor was he aware of any studies that have presented evidence of recidivism rates that specifically look at the distance sex offenders live from a school or child care facility.

Dr. McEchron testified that a restriction that applies for the remainder of an individual's life, regardless of progress made in treatment, does not aid in the treatment process because such a restriction does nothing to help motivate the offender. Rather, Dr. McEchron admitted that such restrictions could actually be a problem for treatment because the restriction seems unfair to the individual offender. He agreed that the residency restriction might be a setback for a person who is doing well in treatment, stating that it, "might not always be the case, but it certainly isn't going to help him therapeutically. It's not going to help them towards a good attitude towards authority and society, and it may spiral them into depression." *Id.* at 51-52. Dr. McEchron further agreed

that a law that would prevent a patient from living with, or being a part of, his or her family would be detrimental to the progress in treatment.

Sex offenders, Dr. McEchron explained, attempt to avoid the restrictions that have been placed on them in order to create the opportunity or temptation to re-offend. As such, Dr. McEchron stated that there are "a number of issues that we try to deal with in treatment that are probably more powerful" than restrictions might be for eliminating re-offense because of opportunity and temptation. *Id* at 36. He listed victim identification, victim insight, relapse prevention, and any possible mental health and substance abuse issues as controls to identify and treat to avoid later temptations and opportunities. Dr. McEchron testified that, "if there are those controls, you have isolated the problem and made it more manageable for the offender." *Id.* at 36. Dr. McEchron stated that he knew of no particularly safe distance for those offenders who have not demonstrated self-control or adopted tools of relapse prevention. "There isn't any good, hard data on what the minimum or maximum is. . .I think its what's inside the person's mind." *Id.* at 41.

3. Dr. Luis Rosell

Dr. Luis Rosell, a clinical and forensic psychologist in Mount Pleasant, Iowa, testified as an expert witness for Plaintiffs. Dr. Rosell has testified in five different states on behalf of convicted sex offenders in proceedings for the post-incarceration civil commitment of sexually violent predators. After receiving his master's degree in 1988, Dr. Rosell worked as a master's level psychologist at the Reception Center in Baltimore, Maryland, a state run sex offender treatment program. Dr. Rosell received a doctorate in psychology in 1998. He has given numerous presentations on

the topic of sex offender treatment. Dr. Rosell is also a member of the Association for the Treatment of Sexual Abusers (ATSA).

From October 1998 until April 2002, Dr. Rosell served as the program director of the sex offender treatment program in Mount Pleasant, Iowa. In this capacity, his duties included supervising the twelve to thirteen correctional counselors who provided the majority of the treatment, as well as the master's-level psychologists, who helped with evaluations.

In preparation for his testimony in this case. Dr. Rosell sent a mass email to his colleagues in the ATSA, asking for any research on residency restrictions for sexual offenders. Although the email was sent to the more than one thousand members, the only response came from Stephen J. Hout, director of the sexual offender treatment program for the Minnesota Department of Corrections. Hout referred Dr. Resell to his study, based on the State of Minnesota's inquiry into residency restrictions, entitled Level Three Sex Offenders Residential Placement Issues. *See* Plaintiffs' Ex. 41. Dr. Rosell testified that, to his knowledge, this study is the only professional writing that has in some way attempted to address residential placement issues as they pertain to sexual offenders.

a. Categorization of Sex Offenders

Dr. Rosell testified that it can be helpful to break sex offenders into different categories, "especially when it comes to determining risk." Categorization of offenders is based first on a victim type, such as pedophilia. From this initial determination, there are different subcategories within pedophilia. The first subcategory depends on the sex of the victim, and the second subcategory delineates between

incestual and non-incestual offenses. Dr. Rosell stated that the most common type of victim is one who has a familial relationship to their offender. While acting as program director in Mt. Pleasant, he observed that, at one time, of the 300 sexual offenders that were being treated, about forty nine percent had some form of relationship to their victim, and another twenty five to thirty percent knew their victims, either as friends, neighbors, or in a similar capacity. Dr. Rosell remarked that, in his experience, "stranger relationships," where the offender does not know his or her victim, "have always been the least common type of relationships." The final descriptor used to categorize offenders is "exclusive versus nonexclusive type," where exclusive type means that the offenders are only attracted to children and have no interest in adults. Nonexclusive type sex offenders are individuals who have adult relationships most of the time, but who have also committed offenses against children and meet the criteria for pedophilia.

A Swedish study which categorized sexual offenders by the modus operandi of the individual offenders has indicated that there can be stability in the offender's choice of victim. Dr. Rosell explained that the study, which looked at 1,400 subjects, found that seventy five of them re-offended. These seventy five were then broken down to examine the type of offense in which they had engaged. The study showed significant stability in regards to the offenders' choice of victims such that individuals that offended against males continued to offend against males, and so on. Offenders choice of victim by age groups also remained stable. Dr. Rosell opined that, "if an individual offends against 14 or 15 year old girls, they're most likely going to stay in that range."

b. Recidivism Rates

In discussing recidivism rates, Dr. Rosell referred to a 1998 study conducted by Dr. R. Karl Hanson and Monique Bussière, entitled, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies. *See* Plaintiffs' Ex. 50. Dr. Hanson's study involved a large "meta-analysis," or a statistical study of other studies, that looked at sixty one studies with up to 28,000 subjects. They found that in a four- to five-year follow-up, 13.4 percent of child molesters re-offended and about 18.9 percent of adult rapists re-offended. Dr. Rosell also discussed a 2002 meta-analysis conducted by Dr. Hanson that examined the treatment outcome of 9,000 subjects. In that study, Dr. Hanson reported that among individuals that did not complete treatment, seventeen percent re-offended. Among those who did complete treatment, ten percent re-offended.

When asked to provide an opinion based on all studies that examine recidivism rates for sex offenders, Dr. Rosell placed the recidivism rate over twenty years for sex offenders as a whole around twenty to twenty five percent, but qualified his answer by saying, "a lot depends on the individual." As an example, he cited one study that found the recidivism rate to be about ten percent for incest offenders and twenty five percent for extra-familial offenders. Dr. Rosell agreed, however, that many, but not all, sex offenders will have to deal with their behaviors for the remainder of their lives. Over time though, Dr. Rosell stated, Dr. Hanson's study makes clear that recidivism rates will decrease. He explained, "its believed that if an individual hasn't recidivated after 10 or 15 years, obviously they have learned the right way to go and that likelihood is decreased."

c. Treatment and Restrictions

As a general method for treating sex offenders, Dr.

Rosell explained that "each person is going to have a different factor that led them to engage in this inappropriate act or acts." As such, "the main thing about treatment is to identify all of those, then later assist. . . the individual with [creating] coping mechanisms that can be implemented so that in the future, when they are confronted with similar situations, they don't act in the same way." Treatment restrictions are then considered based on the factors that led to the offending behavior to ensure that these elements are not duplicated when the individual is released from prison. Dr. Rosell explained that he would be concerned about whether the person had any substance abuse history and whether that was related to his offending behavior. Restrictions, he stated, "are going to be based on what type of victim they have."

Dr. Rosell agreed that specifically restricting a sex offender's access to children was a good idea, and explained that the children he would be concerned about restricting the offender from would depend on the type of offending behavior in which that individual had engaged. For example, this would involve distinguishing an exira-familial offender from an intra-familial offender, as "there are some offenders that offend only in the home, children, stepchildren, nieces, and cousins." Dr. Rosell challenged the societal belief that sex offenders are the "ones we read about who kidnap kids and then there is a big search for them," noting, "those are the exceptions, not the rules." According to Dr. Rosell, "we need to be more aware of the ones who we actually know who they are and we may even be related to them."

Dr. Rosell was also asked whether he believes it would be appropriate, in restricting access to children, to make the restriction apply to all minor children. Ue answered that the diagnosis is, "going to be made on an individual

basis,"and agreed with Plaintiffs' counsel that a probation officer, parole officer, or someone in the prison system should be able to determine with some reasonable accuracy what am appropriate restrictions with regards to children.

Dr. Rosell stated that he was not aware of any literature suggesting that the distance or proximity to a school or daycare center is a factor in whether or not someone was going to re-offend. He testified that in Dr. Hanson's large meta-analysis he looked at an exhaustive list of factors. Proximity was not one of the factors addressed. When asked about the Minnesota study, which examined thirteen people over two years, Dr. Rosell said of thirteen level offenders who re-offended, in not one of the cases was the recidivism related at all to proximity or the 1,500 law. Dr. Rosell pointed to the study's third finding, which reads:

There is no evidence in Minnesota that residential proximity to schools or parks affects re-offense. Thirteen level three offenders released between 1997 and 1999 have been rearrested for a new sex offense since their release from prison, and in none of the cases has residential proximity to schools or parks been a factor in the re-offense.

Plaintiffs' Ex. 41 at 11.

In response to questioning as to whether the distance that someone lives from a school has any impact at all with regard to re-offending, Dr. Rosell said, "not in general," and remarked that, "basically, if an individual wants to get children in, he can find ways." Plaintiff's counsel then asked whether the logic of that would have him limiting people with regard to schools and parks and playgrounds and arcades. Dr. Rosell replied, "if an individual has that history. But not everybody has that type of history."

When asked by defense counsel whether he would

agree that for those individuals who have a propensity or potential to re-offend, but who do not have parole or probation supervision, there is probably a good justification for this law, Dr. Rosell disagreed, stating, "I don't even think it would really make that much of a difference . . . I don't believe that residential proximity makes that big of a difference. If an individual wants to offend, he will offend. It doesn't really matter how close the school is." Dr. Rosell went on to state that he did not feel that § 692A.2A was an appropriate or effective safeguard against re-offense, but he did agree that for a few offenders, such as those without intensive supervision, sound treatment would be to remove opportunities and temptations from the individual. By removing opportunity, the likelihood of re-offense is decreased, he explained, because by definition, if "the opportunity is not there, then you really can't offend." Because, however, § 692A.2A applies to all sex offenders with minor victims, Dr. Rosell reasoned that the law was not really appropriate from a "common sense modality." As he explained, "if an individual has victims of fifteen year-olds and he has shown no propensity to any attraction to children, being worried that he is a thousand feet from an elementary school is really not that — it's over-worry." According to Dr. Rosell, the two thousand foot restriction is too restrictive, and the law does not adequately address the danger to public safety.

When asked his opinion on whether the Act could actually be counterproductive with regard to making the community safer, Dr. Rosell stated that "it could be counterproductive to the individual in numerous ways, which can make it another barrier that he deals with. Then maybe increase the likelihood of the individual becoming depressed

and then giving up and who knows what an individual might do when they have just given up." He explained that depression could result because after the offenders "come out of prison already with having to register, community notification, they feel like a pariah." Furthermore, "if they are not allowed to go back and live with their wives or mothers or brothers, who is going to help them get back on their feet? Then it's just another barrier that they are having to deal with." Dr. Rosell testified that "a support system is important for everybody, not just the sex offender," and that "the support system might not be available to that individual if he has to live apart from them."

For the majority of offenders, Dr. Rosell noted, it is unnecessary to impose a residency restriction if those offenders are already under supervision by probation or parole officers. He stated, "I can only think of specific examples in which I thought it would be appropriate. Those are specific exceptions, not the general rule." He also testified that two thousand feet is an "extreme...it is just pretty excessive." He added that it might not be effective "because the individuals who are going to go to a daycare or take a kid from a school, are usually very predatory and dangerous individuals, and those are the exceptions, not the rule." For these individuals, Dr. Rosell concluded, "it doesn't matter if it was a two mile radius that they could not be close to. If they want to take someone, they will."

II. CONCLUSIONS OF LAW

To declare a legislative Act unconstitutional is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J. concurring). In so doing, "the rule is settled that as between two possible interpretations of a statute, by one of

which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same." *Id.*

The class of Plaintiffs represented here challenges the constitutionality of Iowa Code § 692A.2A on a number of grounds. First Plaintiffs argue that the law imposes an unconstitutional punishment on those subject to the restrictions. Plaintiffs contend that by restricting where sex offenders may live, § 692A.2A in fact imposes a punishment that is the functional equivalent of banishment. Because the Act is punitive, Plaintiffs argue, retroactive application of the law to those individuals who committed their crimes before July 1, 2002 is a violation of the ex post facto clause of the United States Constitution.

Next, Plaintiffs contend that § 692A.2A unconstitutionally impedes on their substantive due process rights. Plaintiffs argue that the residency restriction infringes on the constitutionally protected right to travel because class members who may wish to return to Iowa or migrate to Iowa would not be able to because of the lack of legal housing. As well, those class members who were exempted from the restriction because they had established their residence prior to July 1, 2002, are unable to establish a new residence because there are so few places to live. Plaintiffs also argue that § 692A.2A infringes on the right to family privacy because the law restricts an individual's ability to associate and live with the family members of his or her choosing.

In addition to claiming that § 692A.2A infringes upon their substantive due process rights, Plaintiffs argue that the Act violates their Fourteenth Amendment right to procedural due process because the residency restrictions apply to all class members without providing sufficient notice, an

opportunity to be heard, or any sort of review process.

Lastly, Plaintiffs contend that § 692A.2A violates both their Fifth and Eighth amendment rights against self incrimination and cruel and unusual punishments. Plaintiffs argue that the Act infringes on the Fifth Amendment right against self incrimination because sex offenders, by law, must register their addresses with local law enforcement. Failure to register is itself a criminal offense. *See* Iowa Code § 692A.7. If, therefore, an individual resides in a restricted zone, he will be admitting to a crime when he provides his address to comply with the registration law. As such, Plaintiffs contend that § 692A.2A forces offenders to unlawfully incriminate themselves. Plaintiffs also argue that § 692A.2A violates the Eighth Amendment's guarantee against cruel and unusual punishment, because excluding sex offenders from certain areas amounts to banishment. The Court will consider each claim separately.

A. Ex Post Facto

The United States Constitution specifically bans both the federal government and the states from passing ex post facto laws. *See* Art. I, §9, cl. 3 (federal government); Art. I, §10, cl. 1 (state government). Literally, the Ex Post Facto Clause prohibits the passage of a law after the fact. *Calder v. Bull*, 3 U.S. 386, 390 (1796) (Chase, J., seriatim). Upon initial review, however, the United States Supreme Court stated that without explanation, the Clause is unintelligible and meaningless. *Id.* Consequently, the Court has spent more than two centuries deriving perspicuity from the otherwise ambiguous term of art. In dicta in a seriatim opinion in the 1796 case of *Calder v. Bull*, 3 U.S. 386, Justice Samuel Chase described four categories of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id at 390. *More than two hundred years after Justice Chase identified his categories, the* Supreme Court continues to rely on this framework for analyzing laws under the ex post facto clause. *See e.g. Stogner v. California,* 123 S. Ct. 2446, 2450 (2003); *Carnell v. Texas,* 529 U.S. 513, 539(2000).

Members of the Plaintiff class who committed their crimes before July 1, 2002, the effective date of Iowa Code § 692A.2A, argue that the law is an unconstitutional ex post facto law as applied to them because the Act's residency restriction amounts to a punishment. Plaintiffs assert that the Act effectively banishes them from most towns and communities in Iowa. The residency restriction, Plaintiffs argue, punishes them a second time for their original sex crime. As such, Plaintiffs argument is that § 692A.2A falls within Justice Chase's third category of ex post facto laws, a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. *See Calder,* 3 U.S. at 390.

The State contends that there is no ex post facto problem because § 692A.2A does not punish actions that occurred prior the law's enactment. Rather, the State argues that the only criminal sanction involved is that imposed for violations of the residency restriction. *See* Iowa Code § 692A.2A(3). As such, an individual is not being punished for the prior sex offense, but for residing within a restricted area. The State likens § 692A.2A to criminal statutes prohibiting felons from possessing firearms. Under laws such as this, the individual is a felon and, therefore, subject to the law's restrictions by virtue of the past offense, not current conduct. Violation of the law, however, comes about because of events which can occur only after passage of the law. Here, the State argues, a sex offender falls within § 692A.2's purview because of the prior sex offense. Any further criminal sanction under the law could occur only if a "person" under the law is found to reside in a restricted area after July 1, 2002.

Although initially attractive, the State's position fails to consider the fundamental premise of Plaintiffs' argument, the two thousand foot residency restriction itself constitutes a punishment.

1. Legislative Intent

When faced with the question of whether a given statute imposes a punishment, the Court must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature intended to impose a punishment, the inquiry is complete. *Id.* If, however, the intention of the legislature "was to enact a regulatory scheme that is civil and non-punitive," the Court "must further examine whether the statutory scheme

is "'so punitive either in puipose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *Hendricks*, 521 U.S. at 361 (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980))). In making this determination, the Court should "ordinarily defer to the legislature's stated intent," and "only the clearest proof will suffice tc override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Hendricks*, 521 U.S. at 361; *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, 448 U.S. at 249)).

The Iowa Supreme Court has stated, "the purpose of chapter 692A is clear: to require registration of sex offenders and thereby protect society from those who because of probation, parole, or other release are given access to members of the public." *In Interest of S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997). Iowa Code Chapter 692A, however, contains no such statement of purpose. In *State* v. *Pickens*, published on the same day and cited in *S.M.M.* as controlling, the Iowa Supreme Court specifically acknowledged the lack of clear legislative intent in Chapter 692A, noting "[u]nfortunately, we are not aided by an express legislative statement as to the underlying intent of the Iowa Legislature in enacting chapter 692A." *State v. Pickens*, 558 N.W.2d 396, 399 (Iowa 1997); *see In Interest of S.M.M.*, 558 N.W.2d at 405. The *Pickens* court went on to hold that the purpose of the sex offender registration requirements in chapter 692A are to protect the public, and not to punish sex offenders. *Pickens*, 558 N.W.2d at 400.

Although the Iowa General Assembly has not provided a clear statement of the legislative intent behind § 692A.2A to which the Court can defer, "where a legislative restriction 'is an incident of the State's power to protect the health and

safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Smith v. Doe*, 538 U.S. at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). Iowa Code § 692A.2A would appear to have been crafted for the same purpose as the remainder of chapter 692A, an exercise of the State's police power designed to protect the public from potentially dangerous individuals. As such, the Court must conclude that the intent of the Iowa General Assembly in passing the two thousand foot residency restriction in § 692A.2A. was to create a civil, non-punitive statutory scheme to protect the public.

2. Whether the effect of § 692A.2A is punitive

Having concluded that the intent behind § 692A.2A was civil and not punitive, the Court must now go further and consider whether the effect of the law is so punitive that it negates the State's attempt to craft civil restrictions. *See Smith v. Doe*, 538 U.S. at 92; *Rem v. United States Bureau of Prisons*, 320 F.3d 791, 794 (8th Cir. 2003) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

Where the record lacks conclusive evidence that the legislature intended to enact a penal statute, the Court must consider the law on its face using the seven factors noted in *Kennedy v. Mendoza-Martinez*. *See Smith v. Doe*, 538 U.S. at 97 (citing *Mendoza-Martinez*, 372 U.S. at 168-69). The tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character include:

> whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its

> operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 362 U.S. at 168-69 (citations and footnotes omitted). These same factors apply in a number of constitutional contexts, and they are "neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. at 249, but are useful guideposts," *Hudson*, 522 U.S. at 99. *See Smith v. Doe*, 538 U.S. at 97.

Recently, in *Smith v. Doe*, the Supreme Court referred to the *Mendoza-Martinez* factors when considering the punitive effect of Alaska's sex offender registration laws. In so doing, the Court noted that five of the seven factors were relevant to its analysis. *Smith v. Doe*, 538 U.S. at 97. The Court reasoned that the two remaining factors, whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime, were of little weight because the "regulatory scheme applies only to past conduct, which was, and is, a crime." *Id.* at 105. Because the same holds true in the present case, that the residency restriction in § 692A.2A applies only because of prior criminal sex offenses, the Court's analysis relies on the same five factors used in *Smith v. Doe*.

a. Whether the residency restriction has historically been regarded as a punishment

"A historical survey can be useful because a State that

decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Id.* at 97. In colonial times, "[t]he most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." *Id.* at 98 (citing T. Blomberg & K. Lucken, American Penology: A History of Control 30-31 (2000). Plaintiffs contend that the two thousand foot residency restriction imposed on them by Iowa Code § 692A.2A closely resembles this historical punishment, for offenders are effectively forced out and restricted from returning to their original community lest they be guilty of another offense.

On its face, § 692A.2A does not specifically banish sex offenders from Iowa's many communities. By simply specifying certain areas where sex offenders may not live, the Act would appear to differ from an order of banishment that forever casts a given individual away from the community. Practical application of the Act, however, reveals striking similarities between the two. Under § 692A.2A, sex offenders are completely banned from living in a number of Iowa's smaller towns and cities. In the State's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited. Although some areas are completely unrestricted, these are either very small towns without any services, or farmland. As well, should anyone in an available area decide that he or she no longer wants sex offenders to have the option of moving into the neighborhood, the individual need only register his or her home as a private child development home and a two thousand foot buffer zone emerges.

The effective result of § 692A.2A is that some sex offenders end up remaining in prison beyond their parole dates, choosing between living with their families or complying with the Act, going homeless or breaking the law, or simply leaving the State because no community has a legal space for them. The differences between a law that would leave a man in prison or cause him to go homeless rather than have him reside in the community, and an order forever banishing him, are very slight. As such, the Court finds that the regulatory scheme employed in § 692A.2A has historically been regarded as a punishment.

b. Whether the Act imposes an affirmative disability or restraint

When determining whether a law subjects those within its purview to an "affirmative disability or restraint," *Martinez-Mendoza*, 372 U.S. at 168, the Court inquires "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. at 99-100. The affirmative restraint imposed by Iowa Code § 692A.2A is neither minor nor indirect. Rather, the Act very specifically restricts persons subject to it from living in certain areas under penalty of imprisonment. As noted above, those affected by § 692A.2A are almost completely restricted from living in any of Iowa's population centers. Unlike the registration laws reviewed in *Smith v. Doe*, § 692A.2A does in fact restrain sex offenders from changing residences. *See Id.* at 100. Testimony from the John Doe sex offenders in this case establishes a record replete with "evidence that the Act has led to substantial . . . housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and

landlords." *Id.* As it were, § 692A.2A imposes exactly the affirmative restraint that the Supreme Court found lacking in Alaska's sex offender registration scheme. The Court, therefore, finds that § 692A.2A imposes an affirmative restraint on those subject to it.

c. Whether the operation of § 692A.2A promotes the traditional aims of punishment

The third Martinez-Mendoza factor instructs the Court to consider whether the operation [of § 692A.2A] will promote the traditional aims of punishment -- retribution and deterrence." *Martinez-Mendoza*, 372 U.S. at 168. In *Smith v. Doe*, the State of Alaska conceded that the sex offender registration law at issue there might deter future crimes. *Smith v. Doe*, 538 U.S. at 102. Although Iowa chooses not to consider the two thousand foot residency restriction a punishment, Defendants must concede that § 692A.2A goes even further to deter would-be sex offenders than does a registration and community notification system.

As well, § 692A.2A promotes retribution as the second aim of punishment. Under the Act, sex offenders are subject to the residency restriction regardless of whether they pose a danger to the population. Whether an individual is classified by the Iowa Department of Corrections as a high, low, or moderate risk to re-offend is irrelevant to the restrictions placed on where that person might live. Additionally, no consideration is made of an individual offender's prior offenses or choice of victims. Many of the John Doe Plaintiffs testified that their parole officers would have had no objection to them living in a particular residence but for § 692A.2A. Both Drs. Rosell and McElchron testified that sex offenders tend to prefer a particular type of victim, and although crossover to different victim types does occur, it

is not customary. Dr. Rosell also testified that those treating sex offenders feel most comfortable about a lessened chance of recidivism with those offenders who have not re-offended for a number of years. The residency restriction contains no time limit, and could potentially be enforced for the remainder of the offender's life. The Act, then, goes beyond what is necessary to protect the public and enters into the realm of retribution. Accordingly, the Court finds that § 692A.2A promotes both of the traditional aims of punishment, deterrence and retribution.

d. Whether § 692A.2A may rationally be connected to an alternative purpose

There is no doubt that § 692A.2A has a purpose other than simply to punish sex offenders. The Iowa Supreme Court reasoned that the purpose of Iowa Code Chapter 692A as a whole is to "protect society from those who because of probation, parole, or other release are given access to members of the public." *In Interest of S.M.M.*, 558 N.W.2d at 408. Restated, the purpose of Chapter 692 is to protect the public from sex offenders. Given this purpose, it is certainly reasonable to conclude that restricting sex offenders from residing within two thousand feet of a school or child care facility might also protect society.

e. Whether § 692A.2A is excessive in relation to its alternative purpose

As noted above, the residency restriction in § 692A.2A goes beyond what is reasonably necessary to protect the public. The Act makes no consideration for the type of offender, type of offense, or the offender's risk of re-offending. That is, § 692A.2A applies regardless of whether a particular offender is a danger to the public. As such, the law goes beyond the alternative purpose for which it is related.

The Court, therefore, finds that § 692A.2A is excessive in achieving its purpose of protecting the public.

After reviewing the effect of § 692A.2A under the *Martinez-Mendoza* factors, the Court concludes that the Act goes beyond the legislatures intent to craft a civil regulatory scheme and is, in fact, punitive. The scheme closely resembles that of the historical punishment of banishment. The residency restriction is an affirmative restraint on those subject to § 692A.2A. The Act would be effective at deterring future sex offenders by promoting and promising retribution for those who are convicted. Finally, the Act is connected to the alternative and compelling purpose of protecting the public, but it exceeds that which is reasonably necessary to accomplish this goal. As such, the Court holds that Iowa Code § 692A.2A is "so punitive in effect as to negate [the State's] intention to deem it civil." *Smith v. Doe*, 538 U.S. at 92 (internal citations and quotations omitted). Application of § 692A.2A to those who committed their respective crimes before July 1, 2002, constitutes a retroactive punishment forbidden by the Ex Post Facto Clause of the United States Constitution.

B. Substantive Due Process

The Fourteenth Amendment to the United States Constitution mandates that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In addition to the "guarantee of fair procedure," the Due Process Clause also includes a substantive component, "which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) (citing *Collins v. City of*

Harker Heights, 503 U.S. 115, 125 (1992) (Due Process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.") (quoting *Daniels v. Williams*, 474 U.S. 327, 331(1986))).

In addition to the freedoms enumerated in the Bill of Rights, a long line of Supreme Court cases have held that the substantive Due Process Clause specially protects an individual's liberty interest in the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *id.*; to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and to privacy and choice in one's personal and sexual relationships, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The Supreme Court, however, has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985)).

There are two primary features of the established method of substantive due process analysis. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *id.*, at 720 (quoting *Moore* v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion));

(citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental")), "and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Palko v. Connecticut)* 302 U.S. 319, 325, 326 (1937)). Substantive due process also requires a careful description of the asserted fundamental liberty interest." *Id.* at 721 (citations and quotation omitted). As the Supreme Court has stated, '[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision making' that, direct and restrain our exposition for Due Process Clause." *Id.* (quoting *Collins*, 503 U.S. at 125).

1. Fundamental Rights

a. Right to Personal Choice Regarding Family Matters

The Supreme Court has often recognized a right to privacy and personal choice regarding family matters. As noted in *Roberts v United States Jaycees*, 468 U.S. 609 (1984), "in one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18.

[T]he constitutional shelter afforded such relationships reflects the realization that

> individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore

> safeguards the ability independently to define one's identity that is central to any concept of liberty.
>
> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family – marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of ones life.

Id. at 619-20 (citations omitted).

Plaintiffs contend that § 692A.2A infringes on their right to privacy and choice in personal affiliation because the act interferes with the ability of sex offenders to live with their family members. Plaintiffs take examples from the John Doe testimony to show that in certain instances some offenders remain in prison though their families desperately want them to come home, and others are compelled to move away from their family and support network though both their family members and parole officers are comfortable with them living there. Other offenders are subject to arrest for attempting to live with their husbands or wives.

The State, on the other hand, dismisses Plaintiffs' "warm endorsement of family life" as "fallacious," because the argument "loses sight of the fact that many of the members of the Plaintiffs' class sexually molested their own sons, daughters, or grandchildren." Def.s' Br. at 6. Rather, the State argues that the residency restriction is no different from a zoning regulation as it prohibits certain uses of land within the jurisdiction.

From the outset, the Court flatly rejects the State's attempt to cast § 692A.2A as a zoning regulation. First, those who might violate a zoning regulation are not subject to a year in prison for their misdeeds. More basic though, is that zoning regulations do not identify a specific group of persons and mark off areas wherein they may not live subject to attest. Were the class of people subject to the regulation other than convicted sex offenders, the State's forced segregation would prompt outrage. Without question though, sex offenders are not a suspect class, and the protections available to others when the segregation or discrimination is based on race, sex, or national origin are not available. Even so, the residency restriction goes well beyond that which anyone could reasonably argue is a zoning regulation.

The fundamental right that Plaintiffs assert is a right to privately choose how they want to conduct their family affairs. Included in this right is the right to determine those members of the family with whom one wants to reside. Although Defendants correctly identify that many of the Plaintiff class members committed their offenses against family members, this is not the case for all class members. Yet all class members are subject to the residency restriction. Moreover, the Act restricts flee choice of association, not only for the offenders, but for their family members as well. Upon

completion of the sex offender's penal sentence, the offender has paid his or her debt to society and should have the opportunity to start anew. If an offender's family wishes their relative to return, and the individual is not dangerous, then the choice should be theirs to make. Beyond the offenders, non-offender spouses should also be free from the Hobson's choice of whether to stay with the person to whom they are legally bound, which could involve moving away from the spouse's family, friends, and support network, maintaining separate residences, or dissolving the marriage.

The Court found the testimony of John Doe XIV's wife an exceedingly compelling and informative example of the effect § 692A.2A has on those who have done no wrong themselves. Before § 692A2A went into effect, John Doe XIV's wife had a good job in the city where she grew up and where her family lived. She lived with her husband and their young daughter, and they had recently purchased their first home. After July 1, 2002, her life was thrust into a depressing turmoil when she learned that her husband would be arrested if he continued to live in the house they had just bought. After a frustrating search, she and her family moved away from her lifelong home to live forty five miles away in the country. Where she used to do her part to support the family with one job, she now works two and still has difficulties making ends meet. Because there are no child care facilities nearby, she drives an extra thirty miles every day to take her two children to daycare so that she can work two jobs that pay less together than the job she was forced to leave. She testified that she has suffered nervous breakdowns since moving and is often depressed. On many nights, her four year old daughter cries and asks when they will be able to go home. Yet she has remained by her husbands side and has honored her marital

vows, even though doing so has caused extreme hardship. And she endures this all because three years before she even met him, her then nineteen year old husband exposed himself at a party where a thirteen year old girl happened to be present.

The right to privately choose how to conduct family affairs and decide where and with whom family members will live is held by the entire family; the sex offender is not the only factor in the domestic calculus. Inherent in the right is that the freedom of choice must permeate to all members of the family. As § 692A.2A interferes with these choices, the Court finds that the Act infringes upon Plaintiffs' fundamental right to govern their family affairs as they so desire and without undue interference from the State.

b. Right to Travel

The Supreme Court has described the "constitutional right to travel from one State to another," *United States* v. *Guest*, 383 U.S. 745, 757 (1966), as a right so fundamental and important that it is "assertable against private interference as well as government action...a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). In *Saenz*, the Court noted three different components to the "right to travel." *Id.* at 500. First, it guarantees that a citizen of one state may freely enter and leave another state. *Id.* Next, the right to travel ensures that visitors of another state are welcomed rather than treated as unfriendly aliens. *Id.* Lastly, the constitution protects the right of those who choose to travel to another state and make it their permanent home to be treated as an equal with other citizens of that state. *Id.*

Those members of the Plaintiff class who currently reside outside of the State of Iowa, but who would like to return to the State, allege that Iowa Code § 692A.2A infringes on the right to interstate travel because the Act effectively bans sex offenders from residing in large sections of Iowa's towns and cities. Plaintiffs living in Iowa contend that the Act infringes on the asserted right to intrastate travel. As Plaintiffs concede, however, whether the constitution protects intrastate travel as a fundamental right, as it does interstate travel, is less clear.

In *Johnson v. Cincinnati*, 310 F.3d 484 (6th Cir. 2002). the Sixth Circuit Court of Appeals held, "[t]he Constitution protects a right to travel locally through public spaces and roadways." *Id.* at 498. The Court agrees. Protecting a right to intrastate travel comports with the principles behind the right to interstate travel. Whether an individual travels across many states or a single county, the right to be free to enter, leave, or remain in a place, and to be treated as an equal with current denizens, is a fundamental liberty guaranteed by our constitution.

The State argues that nothing in § 692A.2A precludes sex offenders from traveling into Iowa from other states. Defendants further contend that sex offenders who choose to reside in Iowa are treated the same as other sex offenders regardless of whether the stay is temporary or permanent. As such, the State alleges that § 692A.2A neither discriminates against out of state travelers, nor does it infringe upon any sex offender's right to travel. The Court disagrees.

On its face, § 692A.2A restricts a person from residing within two thousand feet of a school or child care facility. "Residence" is defined at Iowa Code § 692A.1(8) as "the place where a person sleeps, which may include more than

one location, and may be mobile or transitory." As the term is defined, sleep is the only condition for establishing a residence that would be subject to the two thousand foot restriction. Thus, a person may have innumerable transitory residences that are newly established each time he is unfortunate enough to fall asleep. Literal application of the Act would result in the great majority of the State's hotels and motels being restricted to traveling sex offenders. As well, community centers such as homeless shelters and missions will most likely be unavailable to sex offenders because of location. A sex offender simply wanting to travel through the State might be compelled to avoid Iowa altogether lest he stop for the night at an acquaintance's home or a motel and thereby establish an unlawful residence by unwittingly falling asleep. Under § 692A.2A, sex offenders would appear to be able to travel Iowa freely only so long as they do not stop.

Beyond the literal extremes of the Act's scheme, § 692A.2A prevents sex offenders from either moving into or around the State. Those who wish to move into the State are left with very few avenues for obtaining legal housing. Sex offenders who established a residence in Iowa before July 1, 2002, are unable to even consider changing residences lest they lose their exempt status. As such, these individuals are forced to remain in dwellings that may be too small or expensive, or because of any number of conditions that might compel someone to seek out a new residence. For all practical purposes, the right to freely travel and move into or around the State is almost nonexistent for persons subject to § 692A.2A. The Court, therefore, finds that § 692A.2A infringes on Plaintiffs' fundamental right to interstate and intrastate travel.

2. Strict Scrutiny Analysis

Having found that Iowa Code § 692A.2A interferes with Plaintiffs' fundamental right to family choice and privacy, and the right to travel, the Court applies the "strict scrutiny" standard of review. The burden now shifts to the State to show that the Act is narrowly tailored to address a compelling State interest using the least restrictive means possible. *See Roe* v. *Wade*, 410 U.S. 113, 155-56 (1973) (citations omitted).

Both sides agree that the State has a compelling interest in protecting children from sex offenders. The State argues that the law is narrowly tailored to meet this end because the residency restriction creates a buffer zone around schools and child care facilities, thereby reducing the "precursor events" leading to re-offense and eliminating nearby access to potential victims. The Court disagrees.

While resiricting the access sex offenders have to children is likely to reduce the opportunity for re-offense, the State has offered no evidence demonstrating that a two thousand foot "buffer zone" around schools and child care facilities actually protects children. Rather, the State's expert witness, Dr. McEchron testified that the scheme could actually prove detrimental to a sex offender's treatment because the offender may become depressed after deciding that society has given him no chance to rehabilitate. Both Drs. Rosell and McEchron, and Dudley Allison testified that they knew of no specific distance that would protect children. Dr. Rosell further explained that the residency restriction would not stop a determined offender from finding another victim.

Defendants produced no research showing the effect a proximity restriction has on sex offender recidivism rates. In the large meta-analyses, a number of variables are considered

when reviewing recidivism, but proximity is not one of them.

The one study that has reviewed the effect of restricting sex offenders from residing within a certain distance from locations frequented by children reported its findings unequivocally: "[t]here is no evidence...that residential proximity to schools or parks affects re-offense." Pl.s' Ex. 41 at 11. With nothing to suggest that restricting a sex offender from living within two thousand feet of a school or child care facility would actually protect children, the Court finds that § 692A.2A is not narrowly tailored to achieve a compelling State interest.

The Act also fails to apply the least restrictive means necessary to achieve its goal. As noted, the purpose of § 692A.2A is to protect children, yet the Act applies to all relevant sex offenders without consideration of whether the individual is actually a danger to the public. Risk assessments produced by the Iowa Department of Corrections show that not all sex offenders are made alike. Defendants' witness Dudley Allison testified that he has no problem with certain offenders living near schools or child care facilities because he does not find those individuals a danger to re-offend in such a situation. With the enormous restriction placed on the offender, the State cannot justify applying the scheme to all Plaintiffs regardless of whether they pose a danger to the community.

The Court finds that § 692A.2A cannot survive strict scrutiny. There is no close fit between the restriction and the intended purpose of protecting children. The Act also goes too far in its attempt to meet a compelling State concern by restricting all offenders without regard to the actual danger to the community. The Court, therefore, holds that § 692A.2A unconstitutionally infringes on Plaintiffs' substantive rights

under the Due Process Clause of the Fourteenth Amendment.

C. Procedural Due Process

The procedural arm of the Due Process Clause imposes certain restrictions on government decisions that deprive individuals of liberty or property interests. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Specifically, before a State may deprive an individual of a liberty or property interest, the State must provide the individual with notice and an opportunity be heard. *Id.* at 332-33. As the Court noted in *Mathews*, "[t]he 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" *Id.* at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

Plaintiffs allege that § 692A.2A deprives them of their right to procedural due process under the Fourteenth Amendment because § 692A.2A provides no process to allow for an individualized determination of danger to the community, and the Act does not provide fair notice as to circumstances under which an individual could be prosecuted. Defendants argue that the only private interest at issue is Plaintiffs' "preference to live within a convenient distance from work or other family, or in a more beneficial economic circumstance," and contend that the Court must balance this interest against the State's interest in protecting its children. Defs.' Br. at 13. First, the Court must query why sex offenders should not be able to live in residences that are affordable or convenient? Regardless, the Court rejects Defendants' proffered private interest as the Court has already determined that § 692A.2A infringes on a fundamental right.

To determine the specific dictates of due process, the

Supreme Court has identified three distinct factors for the Court to consider: 1) "the private interest that will be affected by the official action;" 2) "The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

As determined above, § 692A.2A infringes upon Plaintiffs' fundamental rights to travel and to privately make decisions regarding family. Accordingly, the private interest affected is significant. Currently there is no risk of erroneous deprivation of the interests because it is denied to all who meet the Act's criteria. Thus there is no decision at all. As a result, those who pose little or no danger to the public, or those who have been cleared to live in a particular residence by a supervising parole or probation officer, are deprived of their right to live where and with whom they so choose. Because the goal of § 692A.2A is to protect children, adding a process that would allow for an individual determination of whether a given offender poses a threat would greatly bolster the procedural safeguard against unnecessary deprivation of Plaintiffs' fundamental rights. Lastly, in considering the cost to the State to allow for a hearing process to determine risk, the Court notes that the State currently has such a process in place. Sex offenders are classified according to risk at the time of their release from state custody. Because the determination of whether the offender is classified as a high, low, or moderate risk to re-offend affects a number of registration requirements under Iowa Code Chapter 692A, the

Court is at a loss to understand why the State would do away with these classifications when imposing the most severe of restrictions on sex offenders. The Court, therefore, finds that § 692A.2A infringes upon Plaintiffs right to procedural due process by failing to provide individuals with an opportunity to be heard before depriving them of protected liberty interests.

Plaintiffs further contend that § 692A.2A lacks the notice required by procedural due process, and the Court agrees. Procedural due process "insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). Under § 692A.2A, the burden is placed on the offender to ensure that they are not living within a restricted area. Some, but not all jurisdictions have developed maps to aid sex offenders in procuring a residence. But, as Carroll County Attorney John Werden testified, these maps are not meant to be accurate: they are reasonable approximations to be used as a guide. As well, Werden brought to light the fact that the Act provides no guidance to the counties on how to implement or enforce the law. Depending on where a county chooses to place the origins for its circles, in the center or at the edge of the property, an offender might live in violation of § 692A.2A under a particular county's interpretation of the Act, while in compliance in a county that employs a different standard of measurement.

Enforcement of the law appears quite varied amongst the several counties as well. In some counties, law enforcement works with the offender to try and find suitable housing, while in others, offenders are arrested for violating the residency restriction without any prior warning. Law

enforcement officials and sex offenders alike testified that they were unsure of how to measure the distance and ended up trying to gauge two thousand feet with an automobile odometer. Taken together, a person of ordinary intelligence faces an extremely difficult challenge in trying to determine whether his or her conduct is violative of the Act. As § 692A.2A deprives offenders of a liberty interest with insufficient notice and no opportunity to be heard, the Court holds that the Act violates the procedural component of the Due Process Clause.

D. Self Incrimination

In relevant part, the Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has long held:

> this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'

Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

Pursuant to Iowa Code § 692A.2, sex offenders are required to register their current address with the county sheriff. Failure to provide this information constitutes an aggravated misdemeanor for a first offense, and a class D felony for subsequent offenses. *See* Iowa Code § 692A.7. If a

sex offender is living in violation of the two thousand foot residency restriction, completing the registration would mean admitting to a criminal act. Because the offender faces criminal charges regardless of whether he completes the registration, Plaintiffs argue that § 692A2A violates their Fifth Amendment right against self-incrimination.

Defendants attempt to align this case to *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), wherein the Supreme Court identified a "routine booking question" exception to *Miranda* that provides that the government can elicit biographical information without informing a suspect of his or her *Miranda* rights, even where the information later turns out to be incriminating. *See Muniz*, 496 U.S. at 589-97. In that case, however, an impaired driver was videotaped while he was being booked. *Id.* at 590. The videotape was later shown to the finder of fact who based its conclusion that Muniz was impaired on his demeanor and responses to the booking questions, not the answers to the questions themselves. *Id.* In reaching its conclusion, the Court noted that Muniz did not incriminate himself with the facts given as answers to the booking questions, but by his appearance and mannerisms in providing the answers. *Id.* at 593. In stark contrast to *Muniz*, though, sex offenders who refuse to provide their current address upon registering are subject to serious criminal charges and substantial jail time. As well, here it is precisely the fact attained by the offender's response that would incriminate him. His demeanor is irrelevant.

To be afforded protection under the Fifth Amendment, incriminating communications must be testimonial. *Id.* at 594. "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201,

210 (1988). Under the registration requirements of Iowa Code Chapter 692A, sex offenders living in violation of § 692A.2A must either provide information that explicitly admits the facts necessary to prove the criminal act or refuse to register and be similarly prosecuted. As such, the Court holds that Iowa Code § 692A.2A unconstitutionally requires sex offenders to provide incriminating evidence against themselves.

E. Cruel and Unusual Punishment

Finally, Plaintiffs argue that § 692A.2A violates the Eighth Amendment's guarantee against cruel and unusual punishments, made applicable to the states by virtue of the Fourteenth Amendment's Incorporation Clause. A punishment will be found to be cruel and unusual either where it inflicts torture, or is otherwise barbaric, or where the punishment inflicted is so excessively severe that it is disproportionate to the offense charged. *Coker v. Georgia*, *433* U.S. 584, 591-92 (1977). Plaintiffs argue that the residency restriction's resemblance to the historical punishment of banishment evidences the barbaric nature of the punishment. Plaintiffs also argue that a lifelong residency restriction for sex offenders is excessive in relation to the crime. The Court disagrees.

Although the effect of § 692A.2A carries with it a strong resemblance to an order of banishment, the Act does not completely banish an individual. Moreover, the Court is not convinced that banishment is truly a barbaric punishment. The list of cases cited by Plaintiffs to show when certain states set aside banishment as a condition of probation would appear to undercut, rather than to assist, Plaintiffs' argument because in none of the cases did the reviewing courts ever completely reject banishment as a condition of probation. *See*

e.g. State v. Muhammad, 43 P.3d 318, 323-24 (Mont. 2002) (comparing decisions regarding banishment and holding that condition at issue went beyond what was necessary); *State v. Franklin*, 604 N.W.2d 79, 83 (Minn. 2000) ("[g]eographical limitations may be imposed as a probation condition, but the condition must be reasonably related to the purposes of probation") (citations omitted). As the Supreme Court has noted, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan*, 501 U.S. 957, 994-95. The Court, therefore, finds that the residency restrictions are not unconstitutionally barbaric or tortuous.

Plaintiffs next contend that the residency requirement in § 692A.2A is disproportionate and, therefore, unconstitutional because the law makes no individual determination for whether a given offender is a danger to the community. Although this argument supports Plaintiffs' position in other claims, it must fail under Eighth Amendment Jurisprudence. The Supreme Court has identified an "individualized capital sentencing doctrine" whereby "a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individual determination that that punishment is 'appropriate'—whether or not the sentence is 'grossly disproportionate,'" *id.*, at 995 (citations omitted), but the Court has flatly refused to apply the doctrine to anything other than capital sentences. *See Id. See also Ewing v. California*, 538 U.S. 11 (2003) (finding California "three-strikes" law constitutional and not cruel and unusual). Plaintiffs may consider a two thousand foot residency restriction cruel or overly harsh, and many would agree. Considered in light of the Eighth Amendment,

however, the Court finds that § 692A.2A is not a cruel and unusual punishment.

V. ORDER

The Court finds that application of Iowa Code § 692A.2A on those Plaintiffs who committed their respective crimes prior to July 1, 2002 violates the Ex Post Facto Clause of the United States Constitution. The Court concludes that the Act unconstitutionally infringes upon Plaintiffs' Fourteenth Amendment rights to substantive and procedural due process. Furthermore, the Court finds that § 692A.2A unconstitutionally requires sex offenders living in violation of the law to provide incriminating testimony against themselves in violation of the Fifth Amendment. Lastly the Court finds that § 692A.2A does not violates the Eighth Amendment's guarantee against cruel and unusual punishments.

Having declared Iowa Code § 692A.2A unconstitutional, the Court hereby permanently enjoins Defendants from enforcing the Act.

IT IS SO ORDERED.

Dated this ___9th___ day of February, 2004.

/s/ Robert W. Pratt
ROBERT W. PRATT
U.S. DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1568

John Doe, I, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, II, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, III, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa,	*	
Appellees,	*	
v.	*	Appeal from the United States District Court for the Southern District of Iowa.
Tom Miller, Iowa Attorney General;	*	
Appellant.	*	
J. Patrick White, as	*	

representatives of the class of all county attorneys in Iowa; Michael Wolf, as representatives of the class of all county attorneys in Iowa,

Defendants.

Submitted: November 4, 2004
Filed: April 29, 2005

Before RILEY, MELLOY, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

In 2002, in an effort to protect children in Iowa from the risk that convicted sex offenders may reoffend in locations close to their residences, the Iowa General Assembly passed, and the Governor of Iowa signed, a bill that prohibits a person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or a registered child care facility. The district court declared the statute unconstitutional on several grounds and enjoined the Attorney General of Iowa and the ninety-nine county attorneys in Iowa from enforcing the prohibition.

Because we conclude that the Constitution of the United States does not prevent the State of Iowa from regulating the residency of sex offenders in this manner in order to protect the health and safety of the citizens of Iowa,

we reverse the judgment of the district court. We hold unanimously that the residency restriction is not unconstitutional on its face. A majority of the panel further concludes that the statute does not amount to unconstitutional *ex post facto* punishment of persons who committed offenses prior to July 1, 2002, because the appellees have not established by the "clearest proof," as required by Supreme Court precedent, that the punitive effect of the statute overrides the General Assembly's legitimate intent to enact a nonpunitive, civil regulatory measure that protects health and safety.

I.

Iowa Senate File 2197, now codified at Iowa Code § 692A.2A, took effect on July 1,2002. It provides that persons who have been convicted of certain criminal offenses against a minor, including numerous sexual offenses involving a minor, shall not reside within 2000 feet of a school or registered child care facility. Iowa Code § 692A.2A(1)-(2). The law does not apply to persons who established a residence prior to July 1, 2002, or to schools or child care facilities that are newly located after July 1, 2002. *Id.* § 692A.2A(4)(c). Violations of the statute are punishable as aggravated misdemeanors. Iowa Code § 692A.2A(3).[1]

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[1]The text of the statute provides as follows:

692A.2A Residency restrictions — child care facilities and schools.

1. For purposes of this section, "person" means a person who has committed a criminal offense against a minor,

or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.

> 2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
>
> 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
>
> 4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
>
> > a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
> >
> > b. The person is subject to an order of commitment under chapter 229A.
> >
> > c. The person has established a residence prior to [] July 1, 2002, or a school or child care facility is newly located on or [after] July 1,2002.
> >
> > d. The person is a minor or a ward under a guardianship.

Iowa Code § 692A.2A. The term "residence" is defined as "the place where a person sleeps, which may include more than one location, and may be mobile or transitory." Iowa Code §692A.l(8).

Almost immediately after the law took effect, three named plaintiffs – sex offenders with convictions that predate the law's effective date – filed suit asserting that the statute is unconstitutional on its face. The district court certified their action as a class action, with a plaintiff class that includes all individuals to whom Iowa Code § 692A.2A applies who are currently living in Iowa or who wish to move to Iowa, except for any person who currently is the subject of a prosecution under § 692A.2A. The named plaintiffs, identified as various "John Does," had committed a range of sexual crimes, including indecent exposure, "indecent liberties with a child," sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse, all of which brought them within the provisions of the residency restriction. A defendant class, including all of Iowa's county attorneys, also was certified.

During a two-day bench trial, plaintiffs presented evidence concerning the enforcement of § 692A.2A, including maps that had been produced by several cities and counties identifying schools and child care facilities and their corresponding restricted areas. After viewing these maps and hearing testimony from a county attorney, the district court found that the restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence. In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders. The court found that unincorporated areas, small towns with no school or child care facility, and rural areas remained unrestricted, but that available housing in these areas is "not necessarily readily available."

Doe v. Miller, 298 F.Supp.2d 844, 851 (S.D. Iowa 2004).[2]

Plaintiffs also presented evidence of their individual experiences in seeking to obtain housing that complies with the 2000-foot restriction. Several of the plaintiffs, including John Does III, IV, XV, and XVIII, have friends or relatives with whom they would like to live, but whose homes are within 2000 feet of a school or child care facility. Many, such as John Does VII, X, XI, XII, XIII, XIV, and XVIII, live in homes that are currently compliant, either because they were established prior to July 1, 2002, or because the homes are outside the 2000-foot restricted areas. These plaintiffs, however, testified that they would like to be able to move into a restricted area. Still others, John Does II, VI, VIII, IX, XV, and XVI, are living in non-compliant residences that they wish to maintain.

Plaintiffs testified that in many cases they had a difficult time obtaining housing that was not within 2000 feet

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[2]The parties presented substantial evidence concerning the effect of the statute on the availability of housing for sex offenders in Carroll County, Iowa. The district court found that 2077 of 9019 residential units in the county (23 percent) were not in restricted areas. The Carroll County Attorney testified that 1694 of the available units were in unincorporated areas of the county, and were "mainly farmhouses," but he noted that the trend toward larger farms has created some vacancies in farmhouses where the party farming the land does not live in the farmhouse. Of the remaining 383 units available in the county, the district court found that 244 were located in towns without a school or child care facility. *Doe v. Miller*, 298 F.Supp.2d at 852.

of a school or child care center. John Doe VII testified that he investigated 40 residences, but was unable to find any housing that would not place him in violation of § 692A.2A. The evidence also showed, however, that while the residency restriction may have exacerbated a housing problem for the plaintiffs, not all of their difficulty was caused by the statute. For example, John Doe II had difficulty finding housing in part because of his credit problems. John Doe XIV testified that the was too expensive, so he and his wife purchased a rural home about 45 miles away. The mother of John Doe IV made efforts to help her son find housing, and she testified that she was able to find two potential residences for her son, but neither residence had any vacant units. John Doe VI was renting an apartment in compliance with § 692A.2A, but had to move out when the landlord decided that he did not want to rent to a sex offender. Similarly, John Does VIII and XI each found at least one possible compliant apartment, but their applications were denied because of their criminal records. In apparent contrast to this testimony from the plaintiffs, Dudley Allison, a parole and probation officer, testified that while the statute made it more difficult for sex offenders to find housing, "virtually everyone" among the covered parolees and probationers whom he supervised between July 2002 and July 2003 was able to locate housing in compliance with the statute. (T. Tr. at 285).

In addition to evidence regarding the burden that § 692A.2A places on sex offenders, both plaintiffs and defendants presented expert testimony about the potential effectiveness of a residency restriction in preventing offenses against minors. The State presented the testimony of Mr. Allison, a parole and probation officer who specialized in sex offender supervision. Allison described the process of treating

sex offenders and his efforts at preventing recidivism by identifying the triggers for original offense, and then imposing restrictions on the residences or activities of the offender. According to Allison, restrictions on the proximity of sex offenders to schools or other facilities that might create temptation to reoffend are one way to minimize the risk of recidivism. In the parole and probation context, Allison also has authority to limit offenders' activities in more specific ways, and he testified that he attempts to remove temptation by preventing offenders from working in jobs where they would have contact with potential victims or from living near parks or other areas where children might spend time unsupervised. In addition to the limits that he imposes on offenders under his supervision, Allison also testified that there is "a legitimate public safety concern" in where unsupervised sex offenders reside. In Allison's view, reoffense is "a potential danger forever."

The State also introduced the transcript of hearing testimony by Dr. William McEchron, a psychologist with a general practice that includes sex offender patients. Like Allison, Dr. McEchron testified that there is no cure for sex offenders and that "there are never any guarantees that they might not reoffend." In his view, the "biggest risk is what's going on inside the individual," but reducing the opportunity and the temptation to reoffend is extremely important to treatment. He explained that because there are "very high rates of re-offense for sex offenders who had offended against children," he believed it would be appropriate to restrict places where sex offenders might come into contact with children. He thought the appropriateness of such a restriction was "common sense," although he said there were insufficient

data to know "where to draw the marks." Dr. McEchron also testified, however, that in his view, life-long restrictions like § 692A.2A do not aid in the treatment process, and could even foster negative attitudes toward authority and depression in offenders who view the law as unfair.

The plaintiffs offered the testimony of Dr. Luis Rosell, a psychologist with experience in sex offender treatment. Dr. Rosell estimated that the recidivism rate for sex offenders is between .20 and 25 percent, and like Allison and Dr. McEchron, stated his belief that the key to reducing the risk of recidivism is identifying the factors that led to the offender's original offense and then helping the offender to deal with or avoid those factors in the future. Dr. Rosell testified that reducing a specific sex offender's access to children was a good idea, and that "if you remove the opportunity, then the likelihood of reoffense is decreased." He did not believe, however, that "residential proximity makes that big of a difference." Moreover, Dr. Rosell thought that a 2000-foot limit was "extreme." Like Dr. McEchron, he worried that the law might be counterproductive to the offender's treatment goals by causing depression and potentially removing the offender from his "support system."

After hearing the testimony of all three experts and of the individual plaintiffs, the district court declared that § 692A.2A was unconstitutional on several grounds, to wit: that it was an unconstitutional *ex post facto* law with respect to offenders who committed an offense prior to July 1, 2002; that it violated the plaintiffs' rights to avoid self-incrimination because, coupled with registration requirements elsewhere in Chapter 692A, it required offenders to report their addresses

even if those addresses were not in compliance with § 692A.2A; that it violated procedural due process rights of the plaintiffs; and that it violated the plaintiffs' rights under the doctrine of substantive due process, because it infringed fundamental rights to travel and to "privately choose how they want to conduct their family affairs," and was not narrowly tailored to serve a compelling state interest. Although the district court believed the law was punitive, the court rejected the plaintiffs' final argument that the law imposed cruel and unusual punishment in violation of the Eighth Amendment. Having found the statute unconstitutional, the district court issued a permanent injunction against enforcement. *Doe v. Miller*, 298 F.Supp.2d at 880.

II.

We first address the contention that § 692A.2A violates the rights of the covered sex offenders to due process of law under the Fourteenth Amendment. The appellees (to whom we will refer as "the Does") argue that the statute is unconstitutional because it fails to provide adequate notice of what conduct is prohibited, and because it does not require an individualized determination whether each person covered by the statute is dangerous. This claim relies on what is known as "procedural due process."

The Due Process Clause provides that no State shall deprive any person of life, liberty, or property without due process of law. The requirement of "due process" has led to the judicial doctrine of vagueness, which requires that a criminal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage

arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

There is no argument here that the words of the statute are unconstitutionally vague. Rather, the Does contend that they are deprived of notice required by the Constitution because some cities in Iowa are unable to provide sex offenders with information about the location of all schools and registered child care facilities, and because it is difficult to measure the restricted areas, which are measured "as the crow flies" from a school or child care facility. We disagree that these potential problems render the statute unconstitutional on its face. A criminal statute is not vague on its face unless it is "impermissibly vague in all of its applications," *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982), and the possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute. A sex offender subject to prosecution under those circumstances may seek to establish a violation of due process through a challenge to enforcement of the statute as applied to him in a specific case. Nor do we believe that the potential for varied enforcement of the restriction, which was cited by the district court, 298 F.Supp.2d at 878, justifies invalidating the entire regulatory scheme. Due process does not require that independently elected county attorneys enforce each criminal statute with equal vigor, and the existence of different priorities or prosecution decisions among jurisdictions does not violate the Constitution.

The Does also argue that § 692A.2A unconstitutionally forecloses an "opportunity to be heard"

because the statute provides no process for individual determinations of dangerousness. This argument misunderstands the right to procedural due process. As the Supreme Court recently explained in connection with a comparable challenge to Connecticut's sex offender registration law, "even assuming, *arguendo*, that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute." *Conn. Dept of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). States "are not barred by principles of *'procedural* due process' from drawing" classifications among sex offenders and other individuals. *Id.* at 8 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion)) (emphasis in original).

We likewise conclude that the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren. Unless the Does can establish that the *substantive* rule established by the legislative classification conflicts with some provision of the Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification. *Id.* at 7-8. Thus, the absence of an individualized hearing in connection with a statute that offers

no exemptions does not offend principles of procedural due process.

III.

The Does also assert that the residency restriction is unconstitutional under the doctrine of substantive due process. They rely on decisions of the Supreme Court holding that certain liberty interests are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). The Does argue that several "fundamental rights" are infringed by Iowa's residency restriction, including the "right to privacy and choice in family matters," the right to travel, and "the fundamental right to live where you want." The district court agreed that § 692A.2A infringed upon liberty interests that constitute fundamental rights, applied strict scrutiny to the legislative classifications, and concluded that the statute was unconstitutional.

The Does first invoke "the right to personal choice regarding the family." They cite the Supreme Court's statement in *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), that "certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme," and the Court's discussion of "marital privacy" in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). They also rely heavily on the Court's decision in *Moore v. City of East*

Cleveland, 431 U.S. 494 (1977), which held unconstitutional a zoning ordinance that defined "family" in such a way as to prohibit a grandmother and her two grandsons from living together in an area designated for "single family" dwellings. A plurality of the Court in *Moore* reasoned that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," and concluded that the governmental interests advanced by the city were insufficient to justify an ordinance that "slic[ed] deeply into the family itself." *Id.* at 498-99 (plurality opinion). Justice Stevens concurred in the judgment on other grounds. *Id.* at 513-21.

We do not believe that the residency restriction of § 692A.2A implicates any fundamental right of the Does that would trigger strict scrutiny of the statute. In evaluating this argument, it is important to consider the Supreme Court's admonition that "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Flares*, 507 U.S. at 302 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). While the Court has not directed that an asserted right be defined at the most specific level of tradition supporting or denying the asserted right, *cf Michael H. v. Gerald D.*, 491 U.S. at 127 n.6 (1989) (opinion of Scalia, J.), the Does' characterization of a fundamental right to "personal choice regarding the family" is so general that it would trigger strict scrutiny of innumerable laws and ordinances that influence "personal choices" made by families on a daily basis. The Supreme Court's decision in *Griswold* and the plurality opinion in *Moore* did recognize

unenumerated constitutional rights relating to personal choice in matters of marriage and family life, but they defined the recognized rights more narrowly, in terms of "intimate relation of husband and wife," *Griswold*, 381 U.S. at 482, or "intrusive regulation" of "family living arrangements." *Moore*, 431 U.S. at 499 (plurality opinion).

Unlike the precedents cited by the Does, the Iowa statute does not operate directly on the family relationship. Although the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences. The plurality in *Moore* emphasized this distinction, observing that the impact on family was "no mere incidental result of the ordinance," because "[o]n its face [the ordinance] selects certain categories of relatives who may live together and declares that others may not." 431 U.S. at 498-99 (plurality opinion). Thus, the reasoning of the *Moore* plurality does not require strict scrutiny of a regulation that has an incidental or unintended effect on the family, *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985) (upholding requirement that firemen reside within city limits), or that "affects or encourages decisions on family mailers" but does not force such choices. *Gorrie v. Bowen*, 809 F.2d 508, 523 (8th Cir. 1987) (upholding regulation requiring that applications for public assistance for dependent children include siblings living in same household). Similarly, the Court in *Griswold* disclaimed authority to determine "the wisdom, need, and propriety" of all laws that touch social conditions, but held unconstitutional a state statute that "operate[d] directly on an intimate relation of husband and wife." 381 U.S. at 482.

While there was evidence that one adult sex offender

in Iowa would not reside with his parents as a result of the residency restriction, that another sex offender and his wife moved 45 miles away from their preferred location due to the statute, and that a third sex offender could not reside with his adult child in a restricted zone, the statute does not directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute. We therefore hold that § 692A.2A does not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny.

The Does also assert that the residency restrictions interfere with their constitutional right to travel. The modern Supreme Court has recognized a right to interstate travel in several decisions, beginning with *United States v. Guest*, 383 U.S. 745, 757-58 (1966), and *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969). The Court subsequently explained that the federal guarantee of interstate travel "protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)). Most recently, the Court summarized that the right to interstate travel embraces at least three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

Although the district court, like some other courts, considered the first component of a right to interstate travel under the rubric of "substantive due process," the Supreme Court has not identified the textual source of that component. The Court has observed that the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," and suggested that this right "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 501 & n.3 (quoting *Guest*, 383 U.S. at 758). The latter two components of the right identified in *Saenz* arise from the Privileges and Immunities Clause of Article IV, § 2, and the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.*

The Does argue that § 692A.2A violates this right to interstate travel by substantially limiting the ability of sex offenders to establish residences in any town or urban area in Iowa. They contend that the constitutional right to travel is implicated because the Iowa law deters previously convicted sex offenders from migrating from other States to Iowa. The district court agreed, reasoning that the statute "effectively bans sex offenders from residing in large sections of Iowa's towns and cities." 298 F.Supp.2d at 874.

We respectfully disagree with this analysis. The Iowa statute imposes no obstacle to a sex offender's entry into Iowa, and it does not erect an "actual barrier to interstate movement." *Bray*, 506 U.S. at 277 (internal quotation omitted). There is "free ingress and regress to and from" Iowa for sex offenders, and the statute thus does not "directly impair the exercise of the right to free interstate movement."

Saenz, 526 U.S. at 501. Nor does the Iowa statute violate principles of equality by treating nonresidents who visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa. We think that to recognize a fundamental right to interstate travel in a situation that does not involve any of these circumstances would extend the doctrine beyond the Supreme Court's pronouncements in this area. That the statute may deter some out-of-state residents from traveling to Iowa because the prospects for a convenient and affordable residence are less promising than elsewhere does not implicate a fundamental right recognized by the Court's right to travel jurisprudence.[3]

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[3]In its analysis of the right to interstate travel, the district court also expressed concern that a sex offender might be compelled to avoid Iowa altogether, lest he establish an unlawful residence by "unwittingly falling asleep" at a location within 2000 feet of a school or child care facility. 298 F.Supp.2d at 875. The court stated that "[l]iteral application of the Act would result in the great majority of the State's hotels and motels being restricted to traveling sex offenders," and that "community centers such as homeless shelters and missions will most likely be unavailable to sex offenders because of location." *Id.* This led the court to conclude that "sex offenders would appear to be able to travel to Iowa freely only so long as they do not stop." *Id.*

We question whether these concerns are even applicable to the plaintiffs, given that the plaintiff class was defined as those sex offenders "currently living" in Iowa or "might wish to live" in Iowa, not vacationers or cross-country travelers. *Id.* at 847. In any event, the Does do not rely on these factual assertions in defending the judgment of the district court, and we do not find evidence in the record that would support a specific finding about the proximity of

The Does also assert that § 692A.2A infringes upon a fundamental constitutional right to *intra*state travel. The Supreme Court has not decided whether there is a fundamental right to intrastate travel, *see Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974), although it observed long ago that under the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States v. Wheeler*, 254 U.S. 281, 293 (1920). During the same era, the Court also commented that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty. . . secured by the 14th Amendment," *Williams v. Fears*, 179 U.S. 270, 274 (1900), but as the Third Circuit observed, "[i]t is unclear whether the travel aspect of cases like *Fears* can be severed from the general spirit of *Lochner v. New York*, 198 U.S. 45 (1905), now thoroughly discredited, that was so prominent in the substantive due process analysis of that period." *Lutz v. City of York*, 899 F.2d 255, 266 (3d Cir. 1990).

Some of our sister circuits have recognized a fundamental right to intrastate travel in the context of a "drug exclusion zone" that banned persons from an area of a city for a period of time, *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-98 (6th Cir. 2002), an ordinance that outlawed "cruising"

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hotels, motels, homeless shelters, and missions throughout Iowa to schools and child care facilities.

and thus limited the ability of persons to drive on certain major public roads, *Lutz*, 899 F.2d at 268, and a law that created a durational residency requirement as a condition of eligibility for public housing. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647-48 (2d Cir. 1971). The Second Circuit, for example, reasoned that it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id.* at 648; *see also Johnson*, 310 F.3d at 497 n.4; *Lutz*, 899 F.2d at 261. Other decisions have held that there is *no* fundamental right to intrastate travel in the context of a bona fide residency requirement imposed as a condition of municipal employment. *Andre v. Bd. of Trs. of Maywood*, 561 F.2d 48, 52-53 (7th Cir. 1977); *Wardwell v. Bd. of Educ.*, 529 F.2d 625, 627 (6th Cir. 1976); *Wright v. City of Jackson*, 506 F.2d 900, 901-02 (5th Cir. 1975); *see also Doe v. City of Lafayette*, 377 F.3d 757, 770-71 (7th Cir. 2004) (en banc) (holding that city's ban of sex offender from all public parks did not implicate fundamental right to intrastate travel, where offender was "not limited in moving from place to place within his locality to socialize with friends and family, to participate in gainful employment or to go to the market to buy food and clothing"); *Hutchins v. District of Columbia*, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (holding that there is no fundamental right for juveniles to be in a public place without adult supervision during curfew hours).

We find it unnecessary in this case to decide whether there is a fundamental right to intrastate travel under the Constitution, because assuming such a right is recognized, it would not require strict scrutiny of § 692A.2A. The district

court and the Does cite the Sixth Circuit's decision in *Johnson* for the proposition that there is a fundamental right to intrastate travel. Accepting that view for purposes of analysis, we believe that any fundamental right to intrastate travel would likely be "correlative" to the right to interstate travel discussed in *Saenz*, *see Johnson*, 310 F.3d at 497 n.4, or would consist of a "right to travel locally through public spaces and roadways." *Id.* at 498. Therefore, the Iowa statute would not implicate a right to intrastate travel for the same reasons that it does not implicate the right to interstate travel. The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement. In this sense, the Iowa law is comparable to the municipal residency requirements that have been held to implicate no fundamental right to intrastate travel in *Andre*, *Wardwell* and *Wright*, and less restrictive on freedom of movement than the ban on access to public parks upheld under rational basis review in *Doe v. City of Lafayette*. By contrast, the decisions finding infringement of a fundamental right to intrastate travel have involved laws that trigger concerns not present here — interference with free ingress to and egress from certain parts of a State *(Johnson* and *Lutz)* or treatment of new residents of a locality less favorably than existing residents *(King)*.

The Does also urge that we recognize a fundamental right "to live where you want." This ambitious articulation of a proposed unenumerated right calls to mind the Supreme Court's caution that we should proceed with restraint in the area of substantive due process, because "[b]y extending constitutional protection to an asserted right or liberty interest,

we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Some thirty years ago, our court said "we cannot agree that the right to choose one's place of residence is necessarily a fundamental right," *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir. 1974), and we see no basis to conclude that the contention has gained strength in the intervening years. The Supreme Court recently has restated its reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended," *Glucksberg*, 521 U.S. at 720 (quoting *Collins*, 503 U.S. at 125), and the Does have not developed any argument that the right to "live where you want" is "deeply rooted in this Nation's history and tradition," *id.* at 721 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)) or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed." *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). We are thus not persuaded that the Constitution establishes a right to "live where you want" that requires strict scrutiny of a State's residency restrictions.

Because § 692A.2A does not implicate a constitutional liberty interest that has been elevated to the status of "fundamental right," we review the statute to determine whether it meets the standard of "rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306. The Does acknowledge that the statute was designed to promote the safety of children, and they concede that this is a legitimate state interest. They also allow that perhaps "certain identifiable sex offenders should not live right across the

street from a school or perhaps anywhere else where there are children." (Appellees' Br. at 51). The Does contend, however, that the statute is irrational because there is no scientific study that supports the legislature's conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children.

We reject this contention because we think it understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable. Although the Does introduced one report from the Minnesota Department of Corrections finding "no evidence in Minnesota that residential proximity of sex offenders to schools or parks affects reoffense," this solitary case study — which involved only thirteen reoffenders released from prison between 1997 and 1999 — does not make irrational the decision of the Iowa General Assembly and the Governor of Iowa to reach a different predictive judgment for Iowa. As the district court observed, twelve other States have enacted some form of residency restriction applicable to sex offenders.[4]

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[4]*See* Ala. Code § 15-20-26(a) ("Unless otherwise exempted by law, no adult criminal sex offender shall establish a residence or accept employment within 2,000 feet of the property on which any school or child care facility is located."); Ark. Code Ann. § 5-14-128(a) ("It shall be unlawful for a sex offender who is required to register . . . and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2000') of the property on which any public or private elementary or secondary school or

daycare facility is located."); Cal. Penal Code § 3003(g) ([A]n inmate who is released on parole for any violation of [sections prohibiting lewd or lascivious acts, or continued sexual abuse of a child] shall not be placed or reside. . . within one one-quarter mile of any public or private school."); Fla. Stat. Ann. § 947.1405(7)(a)(2) ("Any inmate convicted of [certain sexual crimes against minors] and . . . subject to conditional release supervision. . . [is prohibited from] living within 1,000 feet of a school, day care center, park, playground, designated public school bus stop or other place where children regularly congregate."); Ga. Code Ann. § 42-1-13(b) ("No individual required to register...shall reside within 1,000 feet of any child care facility, school, or area where minors congregate."); 720 Ill. Comp. Stat. § 5/11-9.3(b-5) ("It is unlawful for a child sex offender to knowingly reside within 500 feet of a school building. . ."); Ky. Rev. Stat. Ann. § 17.495 ("No registrant. . . who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility."); La. Rev. Stat. § 14:91.1(A)(2) ("Unlawful presence of a sexually violent predator is...the physical residing of a sexually violent predator within one thousand feet of any public or private, elementary or secondary school, a day care facility, playground, public or private youth center, public swimming pool, or free standing video arcade facility."); Ohio Rev. Code Ann. § 2950.031(A) ("No person who has been convicted of. . . either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises."); Okl. Stat. tit. 57, § 590 ("It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution."); Or. Rev. Stat. § 144.642(1)(a) (Rules for post-prison supervision or parole "shall include . . . a general prohibition against allowing a sex offender

There can be no doubt of a legislature's rationality in believing that "[s]ex offenders are a serious threat in this Nation," and that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (alterations in original) (quoting *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion)). The only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children.

We think the decision whether to set a limit on proximity of "across the street" (as appellees suggest), or 500 feet or 3000 feet (as the Iowa Senate considered and rejected, *see* S. Journal 79, 2d Sess., at 521 (Iowa 2002)), or 2000 feet (as the Iowa General Assembly and the Governor eventually adopted) is the sort of task for which the elected policymaking officials of a State, and not the federal courts, are properly suited. The legislature is institutionally equipped to weigh the benefits and burdens of various distances, and to reconsider its initial decision in light of experience and data accumulated over time. The State of Alabama, for example, originally

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to reside near locations where children are the primary occupants or users."); Tenn. Code Ann. § 40-39-211(a) ("No sexual offender,...or violent sexual offender,. . . shall knowingly reside or work within one thousand feet (1,000') of the property on which any public school, private or parochial school, licensed day care center, or any other child care facility is located.").

adopted a residency restriction of 1000 feet, but later increased the distance to 2000 feet. Ala. Code § 15-20-26(a); *see also* 2000 Ala. Acts 728, §1; 1999 Ala. Acts 572, § 3, while the Minnesota legislature apparently followed the recommendation of the State's Department of Corrections that no blanket proximity restriction should be adopted. (Appellee's App. at 338). Where individuals in a group, such as convicted sex offenders, have "distinguishing characteristics relevant to interests the State has authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *City of Cleburne v. Cleburne Living Ct.*, 473 U.S. 432, 441-42 (1985).

The record does not support a conclusion that the Iowa General Assembly and the Governor acted based merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group. *Cf. Cleburne*, 473 U.S. at 448; *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Sex offenders have a high rate of recidivism, and the parties presented expert testimony that reducing opportunity and temptation is important to minimizing the risk of reoffense. Even experts in the field could not predict with confidence whether a particular sex offender will reoffend, whether an offender convicted of an offense against a teenager will be among those who "cross over" to offend against a younger child, or the degree to which regular proximity to a place where children are located enhances the risk of reoffense against children. One expert in the district court opined that it is just "common sense" that limiting the frequency of contact between sex offenders and areas where children are located is

likely to reduce the risk of an offense. (Appellant's App. at 165). The policymakers of Iowa are entitled to employ such "common those who "cross over" to offend against a younger child, or the degree to which regular proximity to a place where children are located enhances the risk of reoffense against children. One expert in the district court opined that it is just "common sense" that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense. (Appellant's App. at 165). The policymakers of Iowa are entitled to employ such "common sense," and we are not persuaded that the means selected to pursue the State's legitimate interest are without rational basis.

IV.

The Does next argue that the residency restriction, "in combination with" the sex offender registration requirements of § 692A.2, unconstitutionally compels sex offenders to incriminate themselves in violation of the Fifth and Fourteenth Amendments. The district court concluded that a sex offender who establishes residence in a prohibited area must either register his current address, thereby "explicitly admit[ting] the facts necessary to prove the criminal act," or "refuse to register and be similarly prosecuted." 298 F.Supp.2d at 879. The court then held that § 692A.2A "unconstitutionally requires sex offenders to provide incriminating evidence against themselves," and enjoined enforcement of the residency restriction on this basis as well.

We disagree that the Self-Incrimination Clause of the Fifth Amendment renders the residency restriction of §

692A.2A unconstitutional. Our reason is straightforward: the residency restriction does not compel a sex offender to be a witness against himself or a witness of any kind. The statute regulates only where the sex offender may reside; it does not require him to provide any information that might be used against him in a criminal case. A *separate* section of the Iowa Code, § 692A.2, requires a sex offender to register his address with the county sheriff. The Does have not challenged the constitutionality of the registration requirement, or sought an injunction against its enforcement, and whatever constitutional problem may be posed by the registration provision does not justify invalidating the residency restriction.

None of the authorities cited by the Does supports invalidation of a substantive rule of law because a reporting or registration requirement allegedly compels a person in violation of that substantive rule to incriminate himself The Supreme Court held in *Marchetti v. United States,* 390 U.S. 39 (1968), and *Grosso v. United States,* 390 U.S. 62 (1968), that a gambler was privileged under the Fifth Amendment not to register his occupation as one in the business of accepting wagers, not to pay the required occupational tax, and not to pay a wagering excise tax, because these submissions would create a real and appreciable hazard of self-incrimination for the gambler. The Court never suggested, however, that the Self-Incrimination Clause prevented the government from criminalizing wagering or gambling. Similarly, in *Leary v. United States,* 395 U.S. 6 (1969), the Court's holding that a plea of self-incrimination was a complete defense in a prosecution for non-compliance with provisions requiring payment of a tax on marijuana imported into the United States did not imply that state laws prohibiting the possession of

marijuana were somehow unconstitutional. *Id.* at 29. And *in Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), where the Court held unconstitutional under the Fifth Amendment a requirement that members of the Communist Party file a registration statement with the Attorney General, it was never intimated that the registration requirement rendered unconstitutional Section 4(a) of the Subversive Activities Control Act, under which Albertson might have been prosecuted as a result of the registration.

Even had the Does challenged the sex offender registration statute, moreover, we believe that a self-incrimination challenge to the registration requirements would not be ripe for decision. Unlike *Albertson*, where the petitioners had asserted the privilege against self-incrimination on multiple occasions, the Attorney General of the United States had rejected their claims, and specific orders requiring the petitioners to register had been issued, 382 U.S. at 75, the process with respect to enforcement of the Iowa sex offender registration statute in conjunction with the residency restriction is far less developed. The record does not show whether any of the plaintiffs has registered with the county sheriff an address that is prohibited by § 692A.2A, whether any of the county attorneys or the Attorney General would seek to use registration information to further a criminal prosecution for violation of the residency restriction (rather than merely as a regulatory mechanism to bring sex offenders into compliance with the statute),[5] or whether the prosecuting

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[5]There is evidence in the record that some Iowa law enforcement authorities, rather than immediately file charges against an offender found to be residing in a restricted zone, have withheld charges while the offender sought housing in an unrestricted area. (T. Tr. at 229).

authorities would recognize a refusal to register as a valid assertion of the privilege against self-incrimination (and thus decline to prosecute a sex offender for failing to register a prohibited residence).

We think that under these circumstances, a self-incrimination challenge to the registration statute would be premature. *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 106-10 (1961); *cf. Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 858 (1984). If and when there is a prosecution for violation of the residency restriction in which the prosecution makes use of a sex offender's registration, a prosecution for failure to register a prohibited address, or some other basis such as in *Albertson* to say that the dispute is ripe, then the self-incrimination issue will be joined. It would then be appropriate to consider such questions as whether the registration requirement as applied falls under the rule of cases such as *Marchetti* and *Albertson*, where the Fifth Amendment was held to prohibit incriminating registration or reporting requirements directed at persons "inherently suspect of criminal activities," *Albertson*, 382 U.S. at 79, or whether the public need for information about convicted sex offenders and the noncriminal regulatory purpose for securing the information might permit enforcement of the requirement consistent with the Fifth Amendment. *Cf. Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 557-59 (1990); *California v. Byers*, 402 U.S. 424, 431-34 (1971) (plurality opinion); *id.* at 457-58 (Harlan, J., concurring in the judgment). At this point, we conclude that the Does' self-incrimination claims is both misdirected and premature.

V.

A final, and narrower, challenge advanced by the Does is that § 692A.2A is an unconstitutional *ex post facto* law because it imposes retroactive punishment on those who committed a sex offense prior to July 1, 2002. The *Ex Post Facto* Clause of Article I, Section 10 of the Constitution prohibits the States from enacting laws that increase punishment for criminal acts after they have been committed. *See generally Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J., seriatim). In determining whether a state statute violates the *Ex Post Facto* Clause by imposing such punishment, we apply the framework outlined in *Smith v. Doe*, 538 U.S. 84, 92 (2003), where the Supreme Court considered an *ex post facto* challenge to an Alaska statute requiring sex offenders to register. Under that framework, we must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Id.* (internal quotation omitted). If the legislature intended criminal punishment, then the legislative intent controls the inquiry and the law is necessarily punitive. *Id.* If, however, the legislature intended its law to be civil and nonpunitive, then we must determine whether the law is nonetheless "so punitive either in purpose or effect as to negate" the State's nonpunitive intent. *Id.* (internal quotations and citations omitted). "[O]nly the clearest proof" will transform what the legislature has denominated a civil regulatory measure into a criminal penalty. *Id.*

The district court found that in passing the residency restriction of § 692A.2A, the Iowa General Assembly intended to create "a civil, non-punitive statutory scheme to protect the public." 298 F.Supp.2d at 868. The Does do not dispute this conclusion on appeal, and we agree that the legislature's intent was not punitive. Although Iowa Code § 692A.2A does not contain any clear statement of purpose, the

residency restriction is codified as part of Chapter 692A, together with a registration system that the Supreme Court of Iowa has declared to have a purpose of "protect[ing] society" and to be a nonpunitive, regulatory law. *In Interest of S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997). "[W]here a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Smith v. Doe*, 538 U.S. at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)) (internal marks omitted). We believe the available evidence leads most naturally to the inference that the restrictions in § 692A.2A are intended, like the restrictions elsewhere in the same chapter, to protect the health and safety of Iowa citizens. Therefore, we conclude that the purpose of the Iowa General Assembly in passing this law was regulatory and non-punitive.

We must next consider whether the Does have established that the law was nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme. In this inquiry, we refer to what the Supreme Court described in *Smith v. Doe* as "useful guideposts" for determining whether a law has a punitive effect. In analyzing the effect of the Alaska sex offender registration law, the Court in *Smith* pointed to five factors drawn from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), as particularly relevant: whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose,

and whether it is excessive with respect to that purpose. *Smith v. Doe*, 538 U.S. at 97. These factors are "neither exhaustive nor dispositive," *id.* (quotation omitted), and while we consider them as an aid to our analysis, we bear in mind that the ultimate question always remains whether the punitive effects of the law are so severe as to constitute the "clearest proof" that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment.

Turning first to any historical tradition regarding residency restrictions, the Does argue that § 692A.2A is the effective equivalent of banishment, which has been regarded historically as a punishment. *See Smith v. Doe*, 538 U.S. at 98. Banishment has been defined as "'punishment inflicted on criminals by compelling them to quit a city, place, or country for a specified period of time, or for life,'" *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting) (quoting *Black's Law Dictionary*), or "expulsion from a country." *Black's Law Dictionary* 154, 614 (8th ed. 2004). The Supreme Court most recently explained that banished offenders historically could not "return to their original community," and that the banishment of an offender "expelled him from the community." *Smith v. Doe*, 538 U.S. at 98; *see also Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that order of deportation is "not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment").

While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, § 692A.2A restricts only where

offenders may reside. It does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence. With respect to many offenders, the statute does not even require a change of residence: the Iowa General Assembly included a grandfather provision that permits sex offenders to maintain a residence that was established prior to July 1,2002, even if that residence is within 2000 feet of a school or child care facility. Iowa Code § 692A.2A(4)(c). The district court, moreover, found that residency restrictions for sex offenders "are relatively new and somewhat unique," 298 F. Supp. 2d at 849 n.4, and as with sex offender registration laws, which also were of "fairly recent origin," *Smith v. Doe*, 538 U.S. at 97 (internal quotation omitted), this novelty "suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Id.*

We thus conclude that this law is unlike banishment in important respects, and we do not believe it is of a type that is traditionally punitive.

The second factor that we consider is whether the law promotes the traditional aims of punishment — deterrence and retribution. *Smith v. Doe*, 538 U.S. at 102. The district court found that the law was both deterrent and retributive, and thus weighed this factor in favor of its finding that the law was punitive. We agree with the district court that the law could have a deterrent effect, but we do not agree that the deterrent effect provides a strong inference that the restriction is punishment. The primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is designed to reduce the likelihood of reoffense by limiting the offender's

temptation and reducing the opportunity to commit a new crime. We observe, moreover, that the Supreme Court has cautioned that this factor not be overemphasized, for it can "prove[] too much," as "[a]ny number of governmental programs might deter crime without imposing punishment." *Id.*

The statute's "retributive" effect is similarly difficult to evaluate. For example, while the Ninth Circuit found punishment where the length of sex offender reporting requirements corresponded to the degree of wrongdoing rather than the extent of the risk imposed, *Doe I v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001), *rev'd sub nom. Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court disagreed, and instead emphasized that the reporting requirements were "reasonably related to the danger of recidivism" in a way that was "consistent with the regulatory objective." *Smith v. Doe*, 538 U.S. at 102. While any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect, we believe that § 692A.2A, like the registration requirement in *Smith v. Doe*, is consistent with the legislature's regulatory objective of protecting the health and safety of children.

The next factor we consider is whether the law "imposes an affirmative disability or restraint." Imprisonment is the "paradigmatic" affirmative disability or restraint, *Smith v. Doe*, 538 U.S. at 100, but other restraints, such as probation or occupational debarment, also can impose some restriction on a person's activities. *Id.* at 100-01. While restrictive laws are not necessarily punitive, they are more likely to be so; by contrast, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. For example, sex offender registration laws, requiring only

periodic reporting and updating of personal information, do not have a punitive restraining effect. *Id.* at 102. At the same time, civil commitment of the mentally ill, though extremely restrictive and disabling to those who are committed, does not necessarily impose punishment because it bears a reasonable relationship to a legitimate nonpunitive objective," namely protecting the public from mentally unstable individuals. *Hendricks*, 521 U.S. at 363.

Iowa Code § 692A.2A is more disabling than the sex offender registration law at issue in *Smith v. Doe*, which had not "led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." 538 U.S. at 100. Although the Does did not present much evidence about housing within restricted areas that would have been available to them absent the statute, they did show that some sex offenders would have lived with spouses or parents who owned property in the restricted zones, and some sex offenders were living in residences within restricted areas that were permitted under the statute's "grandfather" provision. The residency restriction is certainly less disabling, however, than the civil commitment scheme at issue in *Hendricks*, which permitted complete confinement of affected persons. In both *Smith* and *Hendricks*, the Court considered the degree of the restraint involved in light of the legislature's countervailing nonpunitive purpose, and the Court in *Hendricks* emphasized that the imposition of an affirmative restraint "does not inexorably lead to the conclusion that the government has imposed punishment." 521 U.S. at 363 (internal quotation omitted). Likewise here, while we agree with the Does that § 692A.2A does impose an element of affirmative disability or

restraint, we believe this factor ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose.

This final factor — whether the regulatory scheme has a "rational connection to a nonpunitive purpose" — is the "most significant factor" in the *ex post facto* analysis. *Smith v. Doe*, 538 U.S. at 102. The requirement of a "rational connection" is not demanding: A "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103. The district court found "no doubt" that § 692A.2A has a purpose other than punishing sex offenders, 298 F.Supp.2d at 870, and we agree. In light of the high risk of recidivism posed by sex offenders, *see Smith v. Doe*, 538 U.S. at 103, the legislature reasonably could conclude that § 692A.2A would protect society by minimizing the risk of repeated sex offenses against minors.

The district court nonetheless concluded that the statute is excessive in relation to this purpose, because the law applies "regardless of whether a particular offender is a danger to the public." 298 F.Supp.2d at 871. The absence of a particularized risk assessment, however, does not necessarily convert a regulatory law into a punitive measure, for "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, 538 U.S. at 103. The Supreme Court over the years has held that restrictions on several classes of offenders are nonpunitive, despite the absence of particularized determinations, including laws prohibiting the practice of medicine by convicted felons, *Hawker v. New York*, 170 U.S.

189, 197 (1898), laws prohibiting convicted felons from serving as officers or agents of a union, *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion); *id.* at 160-61 (opinion of Brennan, J.), and of course laws requiring the registration of sex offenders. *Smith v. Doe*, 538 U.S. at 106.

In this case, we conclude that a categorical rule is consistent with the legislature's regulatory purpose and not "excessive" within the meaning of the Supreme Court's decisions. While the Does argue that the legislature must tailor restrictions to the individual circumstances of different sex offenders, we view this position as inconsistent with the Supreme Court's direction that the "excessiveness" prong of the *ex post facto* analysis does not require a "close or perfect fit" between the legislature's nonpunitive purpose and the corresponding regulation. The evidence presented at trial suggested that convicted sex offenders as a class were more likely to commit sex offenses against minors than the general population. Dr. McEchron indicated that "there are never any guarantees that [sex offenders] won't reoffend," (Appellant's App. at 162), and Mr. Allison testified that "any sex offender is always going to be of some concern forever." (T. Tr. at 279).

More specifically, in Allison's view, even an offender who committed a crime involving an older victim, such as statutory rape, would be of concern around a day care or elementary school, although the concern may be reduced. (T. Tr. at 278), and Dr. Rosell testified that while he believed that a sex offender who committed an offense with a 14 or 15-year-old victim was likely to stay in that age range, there also was no way to predict whether a sex offender would "cross over" in selecting victims from adults to children or males to females. (Appellee's App. at 149, 184). Dr. Rosell was less

than definitive about the degree to which sex offenders' future behavior was predictable and avoidable; while he personally did not believe residential proximity made "that big of a difference," he agreed that "what works in criminal justice is imprecise at best," and testified that "[t]here is always a risk" of reoffense. (Appellee's App. at 193, 195, 190). In view of the higher-than-average risk of reoffense posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism, we do not believe the Does have established that Iowa's decision to restrict all such offenders from residing near schools and child care facilities constitutes punishment despite the legislature's regulatory purpose.

The Does also urge that the law is excessive in relation to its regulatory purpose because there is no scientific evidence that a 2000-foot residency restriction is effective at preventing sex offender recidivism. "The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but rather an inquiry into "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith v. Doe*, 538 U.S. at 105. In this case, there was expert testimony that reducing the frequency of contact between sex offenders and children is likely to reduce temptation and opportunity, which in turn is important to reducing the risk of reoffense. None of the witnesses was able to articulate a precise distance that optimally balanced the benefit of reducing risk to children with the burden of the residency restrictions on sex offenders, and the Does' expert acknowledged that "[t]here is nothing in the literature that has addressed proximity." (Appellee's App.

198; *accord id.* at 41, 47-48 (testimony of Dr. McEchron)). As even Dr. Rosell admitted, we just "don't know" that the Iowa Legislature "isn't ahead of the curve." *(Id.* at 198).

We believe the legislature's decision to select a 2000-foot restriction, as opposed to the other distances that were considered and rejected, is reasonably related to its regulatory purpose. Given the challenge in determining precisely what distance is best suited to minimize risk to children without unnecessarily restricting sex offenders, and the difficult policy judgments inherent in that choice, we conclude that the Does have not established the "clearest proof" that Iowa's choice is excessive in relation to its legitimate regulatory purpose, such that a statute designed to be nonpunitive and regulatory should be considered retroactive criminal punishment.[6]

* * *

The judgment of the district court is reversed, and the case is remanded with directions to enter judgment in favor of the defendants.

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[6]In view of our conclusion that the statute is not punitive, it follows that the law is not a "cruel and unusual punishment" in violation of the Eighth Amendment. *See Smith v. Doe*, 538 U.S. at 97 (explaining that factors used in determining whether law is punishment for *ex post facto* purposes "have their earlier origins in cases under the Sixth and Eighth Amendments"); *Trop v. Dulles*, 356 U.S. 86, 94-99 (1958) (plurality opinion). Even assuming that § 692A.2A were punitive, we would agree with the district court that the law is neither barbaric nor grossly disproportionate to the offenses committed by the Does. We therefore reject the Eighth Amendment argument urged by the appellees as an alternative ground for affirming the district court.

MELLOY, Circuit Judge, concurring and dissenting.

I join in the majority's opinion, sections I through IV. However, I dissent as to section V because I believe section 692A.2A is an unconstitutional ex post facto law.

The U.S. Constitution prohibits states from passing ex post facto laws. U.S. Const. art. I, § 10, cl. 1. "'Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,'" is an ex post facto law. Stogner v. California, 539 U.S. 607, 612 (2003) (quoting Calder v. Bull, 3 U.S. 386, 390 (1798)).

As set out by the majority, the fundamental question the Court must decide is whether the residency requirement amounts to punishment. We do so by first asking whether the legislature intended the statute to be punitive. If the answer is in the affirmative, that ends our inquiry, and we find the legislation to be an ex post facto law. However, if the legislature intended the statute to be nonpunitive, "we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." Smith v. Doe, 538 U.S. 84, 92 (2003) (internal quotations and citation omitted). I agree with the majority that the purpose of section 692A.2A is to protect the public. This purpose is nonpunitive, so we must determine if the statute "is "is so punitive either in purpose or effect as to negate the State's intention to deem it civil." Id.

I also agree with the majority that the factors outlined in Smith should guide our analysis. However, I part ways with the majority as to how some of the individual factors should

be examined and as to the final outcome of the multi-factor analysis.

1. Have measures like the residency restriction historically been regarded as punishment?

The majority concedes that banishment has historically been regarded as punishment, but points out how the residency restriction differs from banishment. The majority concludes that section 692A.2A is not the type of law that has historically been regarded as punishment. I would find that, although section 692A.2A does not amount to full banishment, it sufficiently resembles banishment to make this factor weigh towards finding the law punitive.

The district court made the following factual findings on the availability of housing:

> [S]ex offenders are completely banned from living in a number of Iowa's small towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited. Although some areas are completely unrestricted, these are either very small towns without any services, or farmland.
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> * * *
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> In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des

> Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods. In smaller towns that have a school or childcare facility, the entire town is often engulfed by the excluded area. In Johnson County alone, the towns of Lone Tree, North Liberty, Oxford, Shueyville, Solon, Swisher and Tiffin are wholly restricted to sex offenders under § 692A.2A. Unincorporated areas and towns too small to have a school or childcare facility remain available, as does the country, but available housing in those areas is not necessarily readily available.

These findings are not clearly erroneous and should therefore be upheld. See Fed. R. Civ. P. 52(a). In its findings, the district court demonstrated how difficult it is for sex offenders to find legal housing in many communities in Iowa due to the housing restriction. It is common that offenders may not return to live in the community they lived in before incarceration, the place where their families live, and/or the place they find work. There are so few legal housing options that many offenders face the choice of living in rural areas or leaving the state. The difficulty in finding proper housing effectively prevents offenders from living in many Iowa communities. This effectively results in banishment from virtually all of Iowa's cities and larger towns.

In Smith, the Supreme Court drew a distinction between Alaska's sex offender registry and colonial punishments such as shaming, branding, and banishment. The Court found that the registry merely involved "dissemination of information," whereas the colonial punishments "either held the person up before his fellow citizens for face-to-face shaming or *expelled*

him from the community." Smith, 538 U.S. at 98 (emphasis added). It described the aim of these colonial punishments as making "offenders suffer permanent stigmas, which in effect cast the person out of the community." Id. (internal quotation and citation omitted). The residency requirement is a permanent stigma as well as a law that effectively casts the person out of the community. Further, Smith also described as banishment situations in which individuals "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." Id. Under this phrasing, section 692A.2A fits the description of banishment.

Of course, the residency restriction does not prevent offenders from living in every community, nor from visiting communities in which they are not allowed to live. In this way, the law differs from complete banishment. However, preventing offenders from making a home in many Iowa communities after they have served their sentence does have substantial similarity to banishment. To the extent that offenders are effectively banished from their desired places of residence, I would find this factor weighs in favor of finding section 692A.2A punitive.

2. Does the residency restriction promote traditional aims of punishment?

The residency restriction serves a traditional aim of punishment: deterrence. The majority attempts to minimize the deterrent effect of the statute by arguing that the statute does not increase the negative consequences for an action, but merely reduces the opportunity for that action to occur. In my view, this distinction is not important. One major reason we use the punishments we do, such as imprisonment, is to

reduce the likelihood of future crimes by depriving the offender of theopportunity to commit those crimes. There is clearly a deterrent purpose at work in section 692A.2A, thus the measure promotes a traditional aim of punishment.

3. Does the residency restriction impose an affirmative disability or restraint?

The majority acknowledges that the residency requirement imposes an affirmative disability or restraint, and I agree. It restricts offenders from living in certain areas. Offenders that live within the restricted areas face criminal penalties. In this way, the restraint differs greatly from the sex offender registry in Smith. The Court in that case pointed out that offenders were "free to change . . . residences." Smith, 538 U.S. at 100. The Court also noted that there was no evidence that the measure disadvantaged the offenders in finding housing. Id. I would find that the affirmative disability or restraint intrinsic in the residence requirement distinguishes it from the sex offender registry in Smith and weighs in favor of finding the law punitive.

4. Does the residency restriction have a rational connection to a nonpunitive purposes?

I agree with the majority that section 692A.2A has a rational connection to the nonpunitive purpose of protecting the public. See In Interest of S.M.M., 558 N.W.2d 405, 408 (Iowa 1997).

v. Is the residency restriction excessive?

Though I believe a rational connection exists between the residency restriction and a nonpunitive purpose, I would find that the restriction is excessive in relation to that purpose. The

statute limits the housing choices of all offenders identically, regardless of their type of crime, type of victim, or risk of re-offending. The effect of the requirement is quite dramatic: many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area. This leaves offenders to live in the country or in small, prescribed areas of towns and cities that might offer no appropriate, available housing. In addition, there is no time limit to the restrictions.

Also, the residency restriction applies to plaintiffs who are not the most serious sex offenders. There is no doubt a class of offenders that is at risk to re-offend and for whom such a restriction is reasonable. However, the restriction also applies to John Doe II, who pleaded guilty to third degree sexual abuse for having consensual sex with a fifteen-year-old girl when he was twenty years old. The restriction applies to John Doe VII, who was convicted of statutory rape under Kansas law. His actions which gave rise to this conviction would not have been criminal in Iowa. The restriction applies also to John Doe XIV, who pleaded guilty to a serious misdemeanor charge in 1995 after he exposed himself at a party at which a thirteen-year-old girl was present. John Doe XIV was nineteen at the time of his offense. The actions of these and other plaintiffs are serious, and, at least in most cases, illegal in this state. However, the severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive.

In my view, four factors weigh in favor of finding the statute punitive, while only one weighs in favor of finding the

statute nonpunitive. The analysis leads me to the conclusion that the residency restriction is punitive. Because the imposition of the residency requirement "'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" Stogner, 539 U.S. at 612 (quoting Calder, 3 U.S. at 390), I would find Section 692A.2A is an
unconstitutional ex post facto law that cannot be applied to persons who committed their offenses before the law was enacted.

APPENDIX D

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1568

John Doe, I, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, II, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa; John Doe, III, on their own behalf and as representatives of the class of all sex offenders in the State of Iowa,	*	
Appellees,	*	
v.	*	Appeal from the United States District Court for the Southern District of Iowa.
Tom Miller, Iowa Attorney General;	*	
Appellant.	*	

J. Patrick White, as	*
representatives of the class	*
of all county attorneys in	*
Iowa; Michael Wolf, as	*
representatives of the class	*
of all county attorneys in	*
Iowa,	*
	*
Defendants.	*

Filed: August 8, 2005 (Corrected 08/24/05)

Before RILEY, MELLOY, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

This matter is before the court on the appellees' motion to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court. The motion follows this court's decision rejecting appellees' constitutional challenges to the residency restrictions of Iowa Code § 692A.2A, relating to certain sex offenders. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). Federal Rule of Appellate Procedure 41(d) provides that a motion to stay the mandate must show that the certiorari petition would present a substantial question and that there is good cause for a stay. In determining such a motion, we consider whether there is a reasonable probability that the Supreme Court will grant certiorari, whether there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest. *See, e.g., Rostker v. Goldberg*, 448 U.S.

1306, 1308 (1980) (Brennan, J., in chambers); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers); Stern, et al., *Supreme Court Practice*, § 17.19 (8th ed. 2002); Fed. R. App. P.41(d), advisory committee's note (discussing 1994 amendment to subdivision (b) and citing Stern, *supra)*.

It is often difficult to predict whether the Supreme Court will grant review in a case involving constitutional issues that have not been addressed directly in previous decisions of the Court. The only arguments advanced by appellees that bear on the likelihood of further review are that the panel divided two to one on its decision finding the statute constitutional, (Motion at ¶ 2), that five members of this court expressed a willingness to consider the mailer en banc, *(id.* at ¶ 3), and that the case presents a matter of "first impression" in the federal courts. *(Id.* at ¶ 4).

The first point is not accurate. The panel unanimously rejected the appellees' facial challenge to the constitutionality of the Iowa statute; the only division concerned the narrower question whether application of the statute to sex offenders convicted prior to the date of enactment ran afoul of the *Ex Post Facto* Clause. Of course, the Court may deem the latter issue alone worthy of review, *cf Smith v. Doe*, 538 U.S. 84 (2003), and it might choose to review questions decided by a unanimous panel. But to the extent appellees rely on division in the panel to show a likelihood of further review, and to justify a continued injunction against enforcement of the entire statute, the argument is of little persuasive value. The panel was unanimous in rejecting appellees' broad arguments that enforcement of the statute should be enjoined with respect to sex offenders convicted after July 2002.

That the case presents issues of "first impression" does not really suggest a probability of further review. It means that there is no conflict in authority among the courts of appeals that might prompt the Court to grant certiorari. *See* Sup. Ct. R. 10(a); *see also Doe v. Petro*, 2005 WL 1038846, at * 3 (S.D. Ohio May 3, 2005) (rejecting request for temporary injunction of Ohio statute restricting residency of sex offenders after concluding that plaintiffs were unlikely to succeed on the merits of their claims). And it increases the possibility that the Court might think it better to allow the States an opportunity to experiment with legislation regulating the residency of sex offenders, and to revisit or reconsider such legislation after early experience, before the Court enters the fray to establish what might be bright-line constitutional rules. Again, of course, the Court may view the issues raised as important questions of federal law that should be settled immediately, *see* Sup. Ct. R. 10(c), but this is a different point relating to the importance of the questions, rather than the novelty of the questions in the federal courts.

In a related argument, appellees urge that we should stay the mandate pending a decision by the Supreme Court of Iowa concerning the constitutionality of the statute, because a holding by the state court that the statute is unconstitutional would "moot" further action by the plaintiff class. It might also be argued that a decision of the state court of last resort in Iowa that conflicted with a decision of this court would increase the likelihood of review by the Supreme Court of the United States. *See* Sup. Ct. R. 10(b). After the motion was filed, however, the Supreme Court of Iowa held unanimously that the Iowa statute does not infringe the rights of a sex offender under the substantive and procedural components of

the Due Process Clause, the Self-Incrimination Clause, or the Cruel and Unusual Punishment Clause, and ruled by a vote of 5 to 2 that the statute is consistent with the *Ex Post Facto* Clause. *State v. Seering*, No. 03-0776, 2005 WL 1790924 (Iowa July 29, 2005). This decision eliminates one ground urged in support of the motion to stay mandate, and the uniformity of opinion between this court and the highest court in Iowa is a factor weighing against the likelihood of further review.

This appeal does present several issues of constitutional law, including one that divided the panel, and five members of our court thought the case worthy of en banc review. We do not doubt that a petition for writ of certiorari will receive careful consideration by the Court. A "reasonable probability" is something less than "more likely than not," and it may be a close case whether there is a "reasonable probability" of further review. We do not believe appellees have demonstrated a particularly strong probability.

Appellees assert that if the mandate issues, "some" sex offenders will suffer "significant hardship," because they will have to move their residences from a restricted zone to a permissible area. (Motion at ¶¶ 1, 5). They do not frame their argument in terms of irreparable harm, and in one sense, there would be none. If appellees ultimately succeed in the Supreme Court, and enforcement of the statute is enjoined, then any sex offender who is required to move from a restricted zone will be able to reestablish a residence within the zone. Although appellees do not press the point, we recognize that the costs of moving a residence may constitute a form of "irreparable harm," because they would not be

recoverable if the statute is later declared unconstitutional. Appellees, however, provide no basis in the record for us to determine how many members of the plaintiff class would be impacted, and the measure of the potential harm is largely speculative. The likelihood of this harm, moreover, is lessened to some extent by a "grandfather provision" for any residence established prior to the enactment of the statute in July 2002. Iowa Code § 692A.2A(4)(c). Only new residences established in the last three years would be affected.

We turn finally to the balance of the equities. To whatever extent members of the plaintiff class would be required to move their residences, there would be some cost and hardship. This equitable consideration, however, is balanced by the public interest in enforcement of the statute, both with respect to members of the plaintiff class who currently reside in a restricted zone, and as it relates to those sex offenders who might seek to reside near a school or child care facility in the future. Iowa Code § 692A.2A is public safety legislation enacted three years ago on a matter of great public concern. This court and the Supreme Court of Iowa have held that it is constitutional. Given the relatively modest showings by the appellees on the likelihood of further review and the risk of irreparable harm, we believe that the equities and the public interest ultimately tip the balance against a stay of the mandate. As always a stay may be available from the Supreme Court its[illegible] Justice of the Court concludes that the governing fac[illegible]s weigh differently. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23. Our judgment is that a stay of the mandate is not warranted.

For the foregoing reasons, the appellees' motion to stay mandate is denied.

Judge Melloy dissents and would grant the motion.

APPENDIX E

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1568

John Doe, I, etc., et al.,	*	
	*	
Appellees,	*	
	*	ORDER DENYING
vs.	*	PETITION FOR
	*	REHEARING AND
Tom Miller, etc.,	*	FOR REHEARING
	*	EN BANC
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris Sheppard Arnold, Judge Murphy, Judge Bye, Judge Melloy, and Judge Smith would grant the petition for rehearing en banc.

(5128-010199)

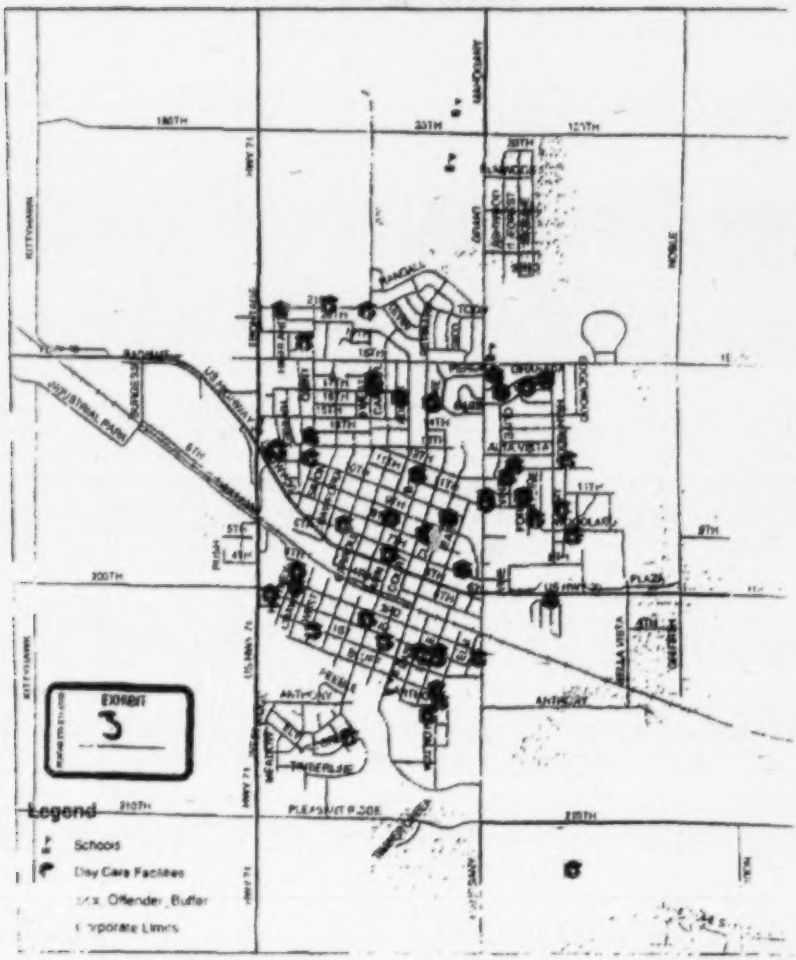
June 30, 2005

Order Entered at the Direction of the Court:

Clerk, US. Court of Appeals, Eighth Circuit

City of Carrol

Sex Offender Buffer



Selected Trial Material

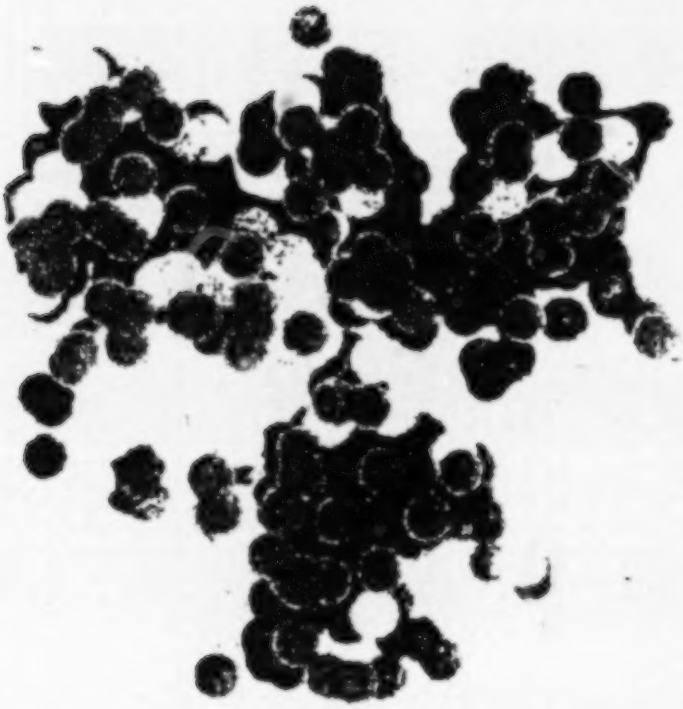


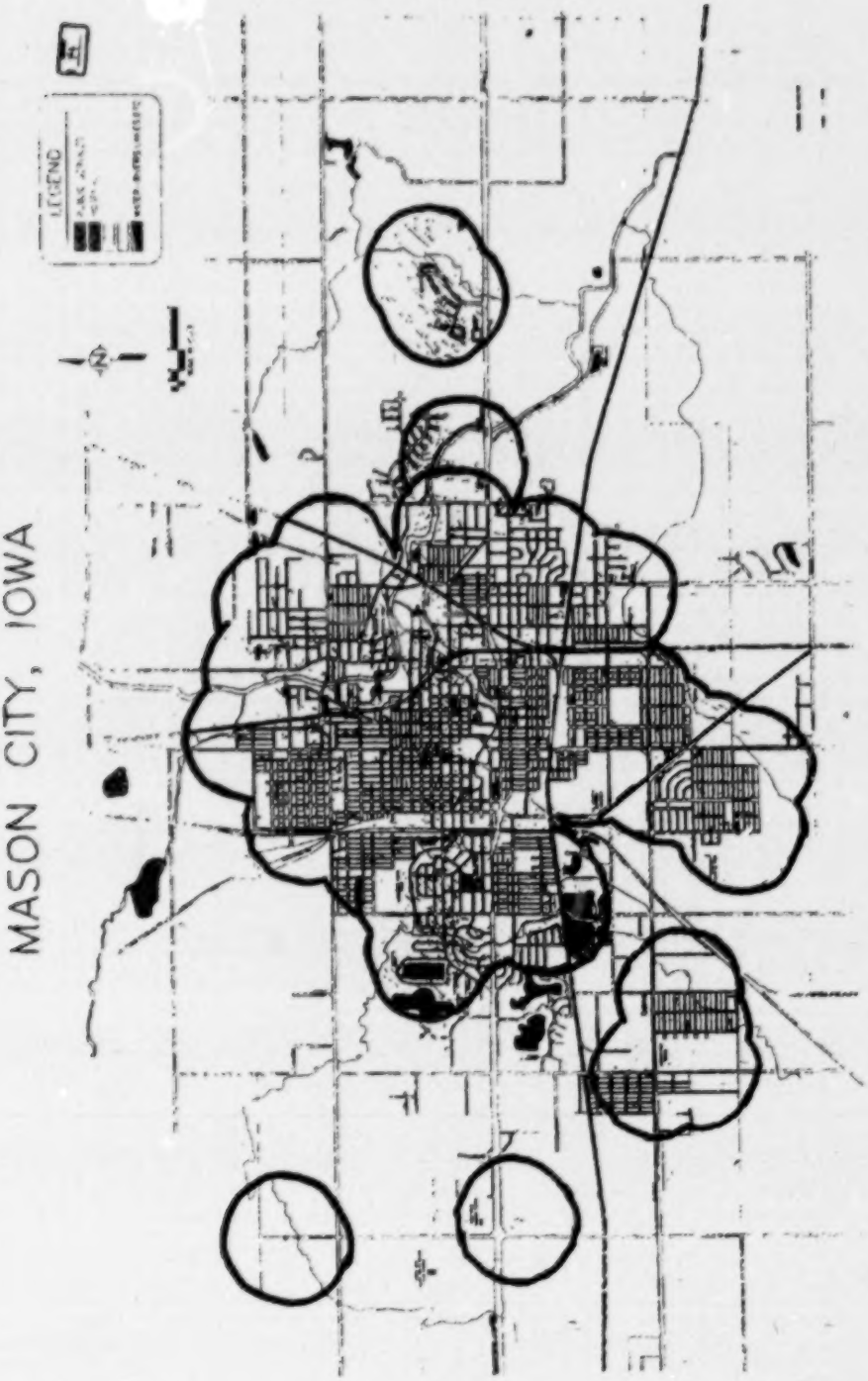
EXHIBIT 8

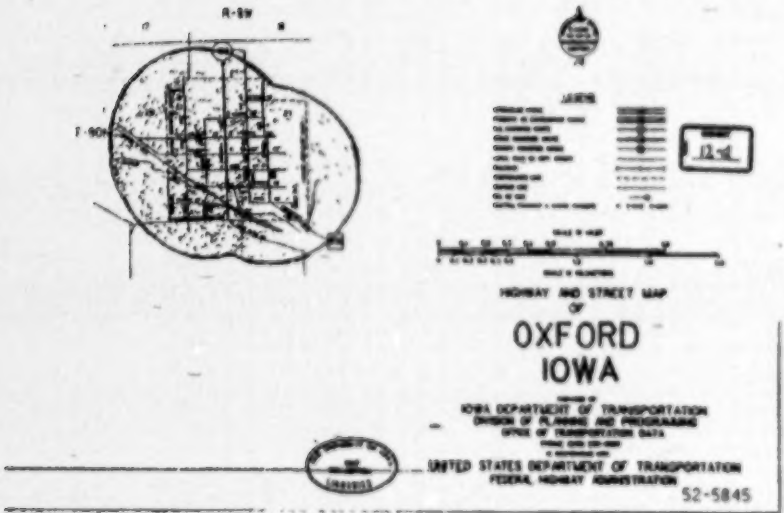
Key

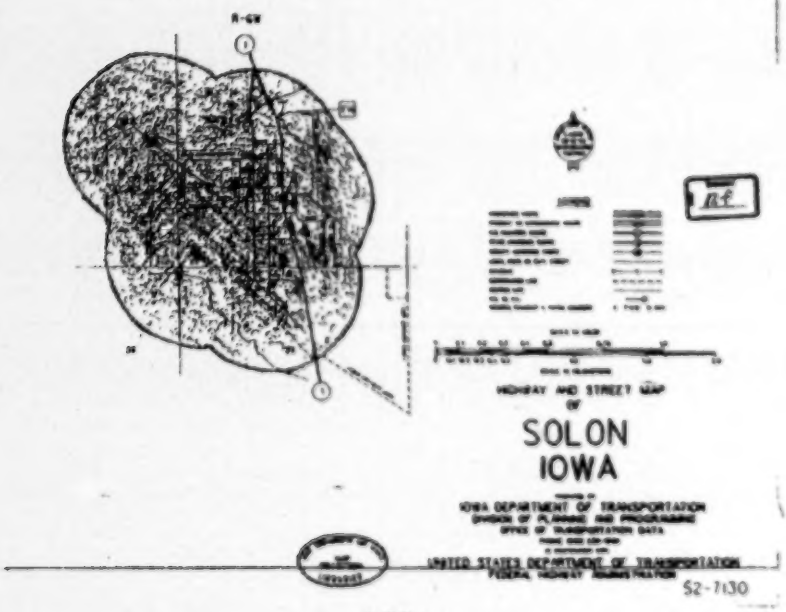
Yellow = Schools
Red = Homes
Blue = Day Cares

Selected Trial Material

Map of Cedar Falls/Waterloo Area


MASON CITY, IOWA
LEGEND


HIGHWAY AND STREET MAP
OF
OXFORD
IOWA
IOWA DEPARTMENT OF TRANSPORTATION
DIVISION OF PLANNING AND PROGRAMMING
OFFICE OF TRANSPORTATION DATA
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
52-5845


HIGHWAY AND STREET MAP
OF
SOLON
IOWA
IOWA DEPARTMENT OF TRANSPORTATION
DIVISION OF PLANNING AND PROGRAMMING
OFFICE OF TRANSPORTATION DATA
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
52-7130

Carroll County Housing Unit Summary					
Jurisdiction	***Inside Safety Zone***	***Outside Safety Zone***	***% off limits***	***Total Housing Units***	***Population** of the towns according to Exhibit 2i*
Arcadia	*181*	*2*	*99*	*183*	*443*
Breda	*222*	*0*	*100*	*222*	*477*
Carroll	*4360*	*71*	*98*	*4431*	*10106*
Coon Rapids	*561*	*10*	*98*	*571*	*1305*
Dedham	*106*	*11*	*91*	*117*	*280*
Glidden	*516*	*1*	*99.9*	*517*	*1253*
Halbur	*83*	*4*	*95*	*87*	*202*
Lanesboro	*0*	*77*	*0*	*77*	*152*
Lidderdale	*0*	*87*	*0*	*87*	*186*

Jurisdiction	Inside Safety Zone	Outside Safety Zone	% off limits	Total Housing Units	Population of the towns according to Exhibit 2i
Manning	663	39	94	702	1490
Ralston	0	47	0	47	98
Templeton	150	1	99	47	334
Willey	0	33	0	33	103
Unincorporated Area	100	1694	6	1794	4992
Total County	6720	2077	76	8915	21421
Total for towns over 200 in population	6842	139	98	6877	15890
Total for towns under 200 in population	0	244	0	244	539

Supreme Court, U.S.
FILED
OCT 2 0 2005
OFFICE OF THE CLERK

No. 05-428

In The Supreme Court of the United States

JOHN DOE I, JOHN DOE II, JOHN DOE III,
on their own behalf and on behalf of the class,

Petitioners,

v.

THOMAS J. MILLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Deputy Attorney General
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COUNTER STATEMENT OF QUESTION PRESENTED

Should not this Court deny certiorari where: (1) the legal issues presented by this case are not especially difficult, (2) no other court that has considered the question of whether statutes imposing residence restrictions for convicted sex offenders has concluded that the statutes are unconstitutional, and (3) the constitutionality of the Iowa statute at issue here was affirmed not only by the Eighth Circuit Court of Appeals but also by the Iowa Supreme Court?

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STATEMENT OF THE CASE

Iowa Code § 692A.2A is a statute which, effective July 1, 2002, prohibits convicted sex offenders from living within 2000 feet of an elementary or secondary school or child care facility. Among various exceptions to this prohibition is a "grandfather" clause for people who, prior to July 1, 2002, established a residence within the 2000 foot zone. Plaintiffs state that "something really bad happened" when this statute was passed. In fact, "really bad" things were happening even prior to the enactment of this statute, some of them by the plaintiffs in this lawsuit, who, as described by the Eighth Circuit, "had committed a range of sexual crimes, including indecent exposure, 'indecent liberties with a child,' sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse." Appx. 102a. Recognizing that the purpose of section 692A.2A was to prevent such "really bad" things from happening again, the Eighth Circuit Court of Appeals concluded that the statute was not unconstitutional. Appx. 98a-144a. Shortly after the decision of the Eighth Circuit Court of Appeals, the Iowa Supreme Court also upheld the statute in *State v. Seering*, 701 N.W.2d 655 (Iowa 2005).

The Eighth Circuit Court of Appeals subsequently declined to stay its ruling pending the filing of a petition for writ of certiorari to this Court. Appx. 146a-151a. Noting the "uniformity of opinion between this Court and the highest court in Iowa", App. at 149a, and the fact that there is "no conflict in authority among the courts of appeals", App. at 148a, the Court found that it did not believe "appellees have demonstrated a particularly strong

probability" that a writ of certiorari would be granted, App. at 149a, and declined to stay its ruling.

SUMMARY OF ARGUMENT

Statutes which impose residency requirements for convicted sex offenders may involve controversial policy decisions, but the constitutional questions raised by such statutes are not controversial. The Eighth Circuit panel, and the full Iowa Supreme Court, have unanimously rejected Due Process challenges to Iowa Code § 692A.2A. Both of these courts have also rejected, albeit not unanimously, ex post facto challenges to the application of the statutes to those people who committed a sex offense prior to the statute's effective date of July 1, 2002. Courts in other jurisdictions have likewise approved the constitutionality of similar statutes. In fact, it does not appear that any court has struck down a comparable statute imposing residency restrictions on convicted sex offenders.

Contrary to plaintiffs' arguments, the decision of the Eighth Circuit Court of Appeals does not conflict with prior law regarding the ex post facto clause, the fundamental right to travel, or the "fundamental right to live with your family". Plaintiffs' argument to the contrary amounts to extrapolation of language taken out of context from prior decisions, and, if accepted by this Court, would dramatically expand the holdings of those decisions.

REASONS FOR DENYING THE WRIT

I. GIVEN THE LACK OF CONFLICT AMONG THE LOWER COURTS ON THE LEGAL QUESTIONS PRESENTED BY THIS APPEAL, FURTHER REVIEW OF THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS UNWARRANTED.

Difficult problems require difficult solutions, and, for a state legislature, there are few problems more difficult than determining how best to protect the most vulnerable members of society from people who have already demonstrated an inclination to prey on them.

One of the ways in which the State of Iowa has sought to protect children from sex offenders is the passage of Iowa Code § 692A.2A, which prohibits certain sex offenders from residing within 2000 feet of certain schools or childcare facilities. At least seventeen other states have passed comparable legislation.[1] No circuit court of appeals or any state supreme court has invalidated any of these statutes. In fact, the Iowa Supreme Court has independently rejected constitutional challenges to the statute in *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). Comparable constitutional challenges to similar legislation has been

[1] The Eighth Circuit Court of Appeals listed twelve states other than Iowa which have enacted residency restrictions applicable to sex offenders. App. at 120a-121a. The Petition for Writ of Certiorari identifies four other states which have adopted similar restrictions. Petition, p. 12. The Petition also identifies a Michigan statute which had been passed by the legislature and was, at the time of writing of the Petition, awaiting signature by the Governor. Petition, p. 13. That legislation was signed into the law by the Governor of the State of Michigan on September 23, 2005, and will become effective on January 1, 2006.

rejected by state or federal courts in Illinois, Ohio and Alabama. *See Doe v. Petro*, 2005 WL 1038846 (S.D. Ohio May 3, 2005) (rejecting request for temporary injunction of Ohio statute restricting residency of sex offenders after concluding that plaintiffs were unlikely to succeed on the merits of their claims); *People v. Leroy*, 357 Ill. App. 3d 530 (Ill. App. 2005); *Lee v. State*, 895 So.2d 1038 (Ala. Crim. App. 2004) (rejecting ex post facto challenge).

Statutes such as the one at issue here certainly raise policy questions that are difficult and controversial. This does not mean, however, that the *constitutional* questions are either difficult or controversial. Indeed, the Eighth Circuit Court of Appeals correctly recognized the appropriately limited role of federal courts in invalidating a statute based on disputes over policy:

> We think the decision whether to set a limit on proximity of "across the street" (as appellees suggest) or 500 feet or 3000 feet . . . is the sort of task for which the elected policymaking officials of the State, and not the federal courts, are properly suited. The legislature is institutionally equipped to weigh the benefits and burdens of various distances, and to reconsider its initial decision in light of experience and data accumulated over time.

Doe v. Miller, Appx. at 122a. Indeed, this reasoning clearly militates against granting certiorari, because this Court "might think it better to allow the States an opportunity to experiment with legislation regulating the residency of sex offenders, and to revisit or reconsider such legislation after early experience, before the court enters the fray to establish what might be bright-line constitutional rules." Appx.

at 148a (Decision denying motion to stay mandate pending the filing of a petition for writ of certiorari).

In summary, given the fact that the Iowa legislation is hardly unique, given the fact that both the Eighth Circuit Court of Appeals and the Iowa Supreme Court have approved the constitutionality of the statute, given the fact that courts in other states have not rejected comparable legislation and given the fact that acceptance of petitioners' arguments would require extreme expansion of this Court's prior precedent (a point discussed in more detail in the next division), this Court should deny this Petition for Writ of Certiorari.

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND PRIOR DECISIONS OF THIS COURT.

Petitioners also assert (somewhat in contradiction to their prior assertion that the issues in this case have not been settled by this Court) that the Eighth Circuit decision below "conflicts" with this Court's prior precedent. In fact, examination of petitioners' argument shows that they are essentially complaining that the Eighth Circuit has refused to extend prior precedent of this Court. This is not a "conflict".

A.

With regard to the ex post facto issue, the court below, Appx. at 128a-137a, correctly applied the legal standard discussed in *Smith v. Doe*, 538 U.S. 84 (2003). The decision reached by the Eighth Circuit is entirely compatible with the independent decision reached by the Iowa Supreme Court, regarding the same statute, in *State v. Seering*, 701

N.W.2d 655, 666-69 (Iowa 2005). Both courts concluded, for example, that, contrary to the arguments advanced by petitioners, the statute was not equivalent to the traditional punishment of "banishment". According to the Iowa Supreme Court, for example, the statute "only restricts sex offenders from residing in a particular area. Offenders are not banished from communities and are free to engage in most community activities. The statute is far removed from the traditional concept of banishment." 701 N.W.2d at 667-68. This is entirely consistent with the conclusions reached by the Eighth Circuit in the decision below, which also noted that, with respect to many offenders, the statute does not even require a change of residence, because of the "grandfather provision" that permits offenders to maintain a residence that was established prior to July 1, 2002, even if that residence is within 2000 feet of a school or childcare facility. Appx. at 130a-131a.

Petitioners also contend that the statute violates the ex post facto provision because it is excessive in its goal of protecting society. Here again, this conclusion has been rejected not only by the Eighth Circuit but also by the Iowa Supreme Court, which noted, in regard to this factor, that "we are mindful that the relative gauge we use to test excessiveness includes the protection of children. In that light, we think it is more difficult to conclude that the restrictions are excessive considering the special needs of children in this particular aspect of our society and the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend." 701 N.W.2d at 668. This reasoning is again fully consonant with that of the Eighth Circuit, which correctly pointed out, quoting *Smith v. Doe*, that the "excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining

whether the legislature has made the best choice possible to address the problem it seeks to remedy," but is, instead, merely an inquiry into whether the means chosen are "reasonable in light of the nonpunitive objective." Appx. 136a. The court below, also noting the imprecision involved in trying to draw specific lines as to what proximity prohibition should be selected by the legislature, concluded that the 2000 foot determination "is reasonably related to its regulatory purpose. Given the challenge in determining precisely what distance is best suited to minimize risk to children without unnecessarily restricting sex offenders, and the difficult policy judgments inherent in that choice, we conclude that the Does have not established the 'clearest proof' that Iowa's choice is excessive in relation to its legitimate regulatory purpose." Appx. at 137a.

As previously noted, other courts that have considered the ex post facto issue with respect to similar legislation have concluded that the statutes involved do not violate that clause. *See, e.g., Doe v. Petro*, 2005 WL 1038846, *2 (denying preliminary injunction, concluding statute "likely does not violate the Ex Post Facto clause"); *People v. Leroy*, 357 Ill. App. 3rd 530 (Ill. App. 2005); *Lee v. State*, 895 So.2d 1038 (Ala. Crim. App. 2004).

B.

Petitioners' next assertion of a "conflict" occurs with regard to the "fundamental right to travel". The decision below carefully analyzed this issue, Appx. at 113a-118a, and correctly concluded that recognizing a violation of any fundamental right to travel in the circumstances of the present case would "extend the doctrine beyond the

Supreme Court's pronouncements in this area." Appx. at 115a. The Iowa statute "does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or childcare facility, and it does not erect any actual barrier to intrastate movement." Appx. at 118a. This observation, which is unquestionably correct, distinguishes the Iowa statute from other cases in which right to travel concerns have been implicated. Thus, just as with their other arguments, petitioners' assertion of a "conflict" really amounts to an assertion that the Eighth Circuit has refused to unnecessarily extend prior holdings of this Court.

C.

Finally, petitioners contend that the decision below conflicts with "prior law with regard to the fundamental right to live with your family." Of course, as noted by the Eighth Circuit, nothing in the statute prevents convicted sex offenders from living with their family. It only prevents them from exercising unfettered discretion as to *where* they will live. "Although the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences." Appx. at 112a. This observation distinguishes prior holdings such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) in which a statute that literally prohibited a grandmother and her two grandchildren from living together in an area designated for "single family" dwellings was held to be unconstitutional. The statute in *Moore*, as specifically noted by this Court, "selects certain categories of relatives who may live together and declares that others may not." 431 U.S. at 498-99 (plurality opinion). There is thus, again, no "conflict" here, a conclusion which was also

independently reached by the Iowa Supreme Court, which noted that although "freedom of choice in residence is of keen interest to any individual, it is not a fundamental interest entitled to the highest constitutional protection." 701 N.W.2d at 664.

CONCLUSION

In an effort to protect Iowa's children from a threat that cannot be quantified with any precision, the Iowa legislature has made a difficult, but certainly not unprecedented, decision. While reasonable people can disagree about the wisdom of the law, its constitutionality is not seriously in doubt. This Court should deny this Petition for Writ of Certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States

JOHN DOE I, JOHN DOE II, JOHN DOE III,
on their own behalf and on behalf of the class,

Petitioners,

v.

THOMAS J. MILLER,

Respondent.

On Petition For Writ Of Certiorari
To The Eighth Circuit Court Of Appeals

BRIEF AMICUS CURIAE OF ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

The Association for the Treatment of Sexual Abusers ("ATSA") is an international, multi-disciplinary professional association dedicated to the research, treatment, and prevention of sexual assault. ATSA's members include the world's leading researchers in the study of sexual violence. Membership is also made up of professionals who evaluate and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments, law enforcement agencies, child protection services, State Attorney's Offices, Public Defender's Offices, victim advocacy groups, and state legislatures in an effort to protect citizens from sexual assault. ATSA advocates for evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders.[1]

SUMMARY OF THE ARGUMENT

The Court should grant the petition for writ of certiorari because of the national significance of the Eighth Circuit's decision in *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

A crisis is looming in Iowa and nationally as a result of the Eighth Circuit's decision. Although the protection of

[1] No counsel for any party authored any part of this brief. The Ohio Justice & Policy Center paid the printing costs of this brief. No other persons or entities made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been submitted to the Clerk of the Court.

children from sexual abuse is indisputably a compelling government interest – one that ATSA works hard to promote – sex offender residency laws actually harm the innocent children they are intended to protect.

Research has shown that sex offenders with stable housing and social support are much less likely to commit new sex offenses compared to those offenders who lack stability. Residency restrictions deprive sex offenders of stable housing and social support, and thus significantly increase the risk of recidivism. Moreover, sex offenders who become homeless as a result of these restrictions will be more difficult to supervise and monitor in the community, thereby increasing the risk to children. Furthermore, sex offender residency statutes create a false sense of security that may leave children more vulnerable to sexual abuse.

There is no evidence that these laws actually protect children. To the contrary, those states that have studied the issue carefully have found no relationship between sex offense recidivism and sex offenders' proximity to schools or other places where children congregate.

In reality, sex offender residency laws are driven by fear, not facts. Despite widespread belief that sex offender recidivism rates are high, recent studies have shown that such recidivism is the exception, rather than the rule, particularly if the offender has received treatment.

The current situation in Iowa and surrounding states illustrates precisely why this case has national significance. Housing in large Iowa cities, with numerous schools and daycares, is already off limits to sex offenders subject to the statute. In the wake of the Eighth Circuit's ruling, "unprotected" smaller towns (i.e., those that do not have a

school or daycare) have rushed to pass ordinances prohibiting sex offenders from living within 2000 feet of parks or other places where children might be expected to congregate. Worried that Iowa sex offenders will try to move there, numerous towns in nearby Nebraska and South Dakota have passed, or are considering enacting, ordinances prohibiting sex offenders from relocating there. There is no end in sight to this domino effect. Ultimately, our nation's children will suffer from laws that destabilize sex offenders and increase the risk of recidivism.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE OF THE NATIONAL SIGNIFICANCE OF THE EIGHTH CIRCUIT'S RULING AND BECAUSE SEX OFFENDER RESIDENCY STATUTES ULTIMATELY HARM, RATHER THAN PROTECT, CHILDREN.

In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), the Eighth Circuit upheld Iowa Code Section 692A.2A, which prohibits sex offenders[2] from living within 2000 feet of schools and daycares. Though well intentioned, sex offender residency statutes like Iowa's make children less, not more, safe.

[2] The statute applies to sex offenders whose offenses involved minors. For convenience's sake, this brief will refer to such individuals as "sex offenders."

A. Sex Offender Residency Statutes Increase the Risk of Harm to Children.

Research demonstrates that stability and support increase the likelihood of successful reintegration for former offenders, and that public policies that make it more difficult for them to succeed undermine public safety. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003). With respect to sex offenders in particular, research has shown that isolation, unemployment, depression, and instability – conditions known as dynamic risk factors – correlate with increased recidivism. *See* R. KARL HANSON & ANDREW J.R. HARRIS, DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM (1998); R. KARL HANSON & KELLY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS (2004); COLO. DEP'T OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY (2004); Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q., 61-88 (2000).

The Iowa statute significantly increases the danger that sex offenders will recidivate by depriving them of housing. The District Court found: "In larger cities such as Des Moines and Iowa City, the maps [detailing the exclusion zones] show that the two thousand foot circles cover virtually the entire city area," and that in "smaller towns that have a school or child care facility, the entire town is often engulfed by an excluded area." *Doe v. Miller*, 298 F.Supp.2d 844, 851 (S.D. Iowa 2004). The Court also found that although "[u]nincorporated areas and towns too small to have a school or child care facility remain available, as

does the country, . . . available housing in these areas is not necessarily available." *Id.*

Additionally, the Iowa statute increases the risk of recidivism by forcing many sex offenders to move from supportive environments that reduce the offenders' re-offense risk. For example, John Doe XVIII sought to live with his adult son upon release from prison but was prohibited from doing so because of the 2000-foot restriction. *Doe v. Miller*, 298 F.Supp.2d 858. Instead, he moved to the countryside, where his access to services and support were limited. *Id. See also* Jill Levenson & Leo Cotter, *The Impact of Sex Offender Residency Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 Int'l J. of Offender Therapy and Comp. Criminology, 168 (2005) (reporting that almost half of the sex offenders surveyed in Florida were prevented from living with supportive family members because of the state's residency restriction).

Uprooting offenders, like John Doe XVIII, from housing, social support and services, and employment opportunities, will only increase, rather than reduce, the risk that they will recidivate and sexually abuse children. This is precisely one of the reasons why the State of Minnesota rejected a proposal to prohibit sex offenders from living within 1500 feet of schools and parks. A study commissioned by the Minnesota Legislature recommended against passing the proposed restrictions in part because they would "pose . . . problems, such as a high concentration of offenders [in rural areas] with no ties to community; isolation; lack of work, education and treatment options; and an increase in the distance traveled by agents who supervise offenders." MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE, 9 (2003). The

study also concluded, as will be addressed in more detail below, that the proposed residency restrictions would not reduce sex offender recidivism. *Id.*[3]

B. There Is No Evidence That Sex Offender Residency Restrictions Protect Children from Sexual Abuse.

Proponents of sex offender residency restrictions argue that such measures are necessary to diminish the likelihood that sex offenders will come in contact with children whom they might potentially victimize. However, there is no basis for such claims. To the contrary, states that have examined the question closely have concluded that such restrictions do not protect children.

The Minnesota study discussed above specifically analyzed whether proximity to schools or parks increased the recidivism rates for sexually violent predators ("level three offenders"). The Study reached the following conclusions:

> Based on the examination of level three re-offenders, there were no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses [observed in the study]. ***Enhanced safety due***

[3] Furthermore, sex offender residency statutes create a false sense of security that may leave children more vulnerable to sexual abuse. *See* Robert F. Worth, *Exiling Sex Offenders From Town: Questions About Legality and Effectiveness*, THE NEW YORK TIMES, Oct. 3, 2005 ("The restrictions could create a false sense of security, since many convicted sex offenders did not live or work near their victims") (quoting Ernie Allen, president of the National Center for Missing and Exploited Children).

> ***to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact.*** The two level three offenders [in the study] whose re-offenses took place near parks both drove from their residences to park areas that were several miles away. . . . Based on these cases, it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known.

Id. (emphasis added).

In 2004, the Colorado Department of Public Safety conducted a similar study. The Colorado researchers concluded: "Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism" COLO. DEP'T OF PUBLIC SAFETY, *supra* at 5.

The Minnesota and Colorado studies demonstrate that while sex offender residency restrictions might be a "comfort factor" to the public, they do not protect children from sexual abuse.

C. Sex Offender Residency Statutes Are Driven by Fear, Not Facts.

Sex offender residency laws are growing in number across the country. The proliferation of these measures, however, is driven by fear, not facts.

Tragic cases of child abduction and sexually motivated murder receive extraordinary media attention, and the

publicity of such events creates a sense of alarm and urgency among citizens. These high profile cases, are partly responsible for the increase in sex offender residency restrictions in recent years. In reality, however, such cases are extremely rare. Approximately 100 stranger abductions occur in the United States each year. *See* Center for Missing and Exploited Children, at http://www.missingkids.com (last visited Nov. 1, 2005). Less than 1% of all murders involve sexual assault, and in fact, the prevalence of sexual murders declined by about half between the late 1970's and the mid-1990's. BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT, 27 (1997).

Moreover, a 2000 Department of Justice study found that 93% of child sexual abuse victims knew their abuser, 34.2% were family members, and 58.7% were acquaintances. BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, 10 (2000). Only 7% of child victims reported that they were abused by strangers. *Id.*[4]

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[4] A consequence of the Iowa statute is that all sex offenders must live at least 2000 feet from schools and childcare centers. Thus, the impact of these laws would be to either permanently separate offenders from their families and children who depend on them, or to force entire families to relocate, creating psychological and financial hardship to innocent family members. This includes the forced relocation of children away from their schools and their friends. Consequently, this may create a strong incentive for children not to report sexual abuse committed upon them by members of their household. Of course, that is counterproductive to the goal of keeping children safe from sexual abuse.

Proponents of sex offender residency statutes also point to allegedly high sex offender recidivism rates as a justification for such laws. Recent research, however, contradicts the myth that most sex offenders will re-offend. For example, the Department of Justice found that 5.3% of sex offenders were rearrested for a new sex crime within three years after release from prison. BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 24 (2003). Moreover, studies by Canadian researchers, who examined recidivism statistics for 29,000 sex offenders in North America and Europe, found a 14% recidivism rate among all sex offenders, though child molesters were re-arrested at a slightly higher rate of about 20%. *See* R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING & CLINICAL PSYCHOL. 348-362 (1998); R. KARL HANSON & KELLY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS (2004). *See also* OHIO DEP'T OF REHAB. & CORR., TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 12, 24 (2001) (reporting total sex offense related recidivism rate of 11% over ten-year period, and characterizing such recidivism as a "fairly unusual" occurrence in Ohio).

While it is true that official recidivism data – for any offense type – always underestimates actual re-offense rates, it is clear, based on the research discussed above, that the majority of sexual offenders are unlikely to commit new sex offenses.[5]

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[5] Some studies, based on older data, have suggested higher recidivism rates. *See e.g.*, Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates Among Child Molesters*

(Continued on following page)

D. The Current Chaos in Iowa and Nearby States Illustrates the National Significance of the *Doe* Decision.

The existing situation in Iowa and surrounding states demonstrates the national significance of this case.

As discussed above, housing in large Iowa cities, with numerous schools and daycares, is already off limits to sex offenders subject to the statute. *See Doe v. Miller*, 298 F.Supp.2d at 851. In the wake of the Eighth Circuit's ruling, "unprotected" smaller towns (i.e., those that do not have a school or daycare) have rushed to pass ordinances prohibiting sex offenders from living within 2000 feet of parks or other places where children might be expected to congregate.[6] Moreover, fearful that Iowa sex offenders will

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and Rapists: A Methodological Analysis, 21 LAW & HUM. BEHAV. 635, 643 (1997) (reporting an estimated recidivism rate of 52%). Drawing conclusions about current recidivism rates based upon old data is unwarranted, however. For example, the subjects of the Prentky study were sex offenders released from prison during the period 1959-1985, before treatment became widespread and state-of-the-art. Additionally, the subjects were the proverbial "worst of the worst," men who were civilly committed for repeat and/or aggressive sex offenses. Because the subjects of the Prentky study were not necessarily representative of sex offenders generally, the authors issued two caveats: (1) "[t]he obvious heterogeneity of sexual offenders precludes automatic generalization of the *rates* reported here to other samples," and (2) "these findings should *not* be construed as evidence of the inefficacy of treatment," since "the treatment services [available to the subjects of the study] were not provided uniformly or systematically and did not conform to a state-of-the-art mode." *Id.* at 656-57 (emphasis in original).

[6] *See, e.g.*, Jaime Copley, *Kanawha Passes Sex Offender Ordinance*, KIMT – NEWSCHANNEL 3, Oct. 18, 2005, *available at* http://www.kimt.com/servlet/Satellite?pagename=KIMT/MGArticle/IMT_BasicArticle&c=MGArticle&cid=1128767621404&path; Thomas Geyer, *Scott Co. Board unveils sex offender law*, QUAD-CITY TIMES, Nov. 1, 2005, *available at* http://www.qctimes.net/articles/2005/10/21/news/local/doc43587d34464b1561452000.txt; Elizabeth Owens, *Council passes sex offender ordinance*, DES MOINES

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try to move there, numerous towns in nearby Nebraska and South Dakota have passed, or are considering enacting, ordinances prohibiting sex offenders from relocating there.[7]

Moreover, numerous municipalities across the country have recently passed, or are considering enacting, sex offender residency statutes,[8] and will likely point to the Eighth Circuit's decision as proof that these statutes pass constitutional muster.

Sex offender residency statutes ultimately harm the nation's children. As sex offenders are denied housing and forced to move from their social support, recidivism rates

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REGISTER, Oct. 21, 2005, *available at* http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20051021/NEWS05/510210328/1001/NEWS.

[7] *See, e.g.*, Katie Backman, *Sex offenders may be subject to housing restrictions*, DAILY NEBRASKAN, Oct. 27, 2005, *available at* http://www.dailynebraskan.com/vnews/display.v/ART/2005/10/27/43606f5094b33; *Omaha Councilman Wants Sex Offender Law*, KETV, Oct. 18, 2005, *available at* http://www.ketv.com/news/5120178/detail.html; *Papillion Looks At Sex Offender Ordinance: Iowa's Law Prompts Nebraska Communities to Consider Limits*, KETV, Oct. 17, 2005, *available at* http://www.ketv.com/news/5109357/detail.html; Christian Richardson, *Area towns follow Iowa's lead on sex offenders*, SIOUX CITY JOURNAL, Oct. 19, 2005, *available at* http://www.siouxcityjournal.com/articles/2005/10/19/news/local/3951e43b3d21d4278625709f000d5062.txt; Frank Santiago, *Nebraska city aims to thwart Iowa sex offenders*, DES MOINES REGISTER, Sept. 21, 2005, *available at* http://www.dmregister.com/apps/pbcs.dll/article?AID=/20050921/NEWS01/509210345/1001.

[8] *See, e.g.*, Rebecca Dellagloria, *Law restricting sex offenders passes*, MIAMI HERALD, Aug. 28, 2005, *available at* http://www.miami.com/mld/miamiherald/news/local/states/florida/counties/miami-dade/cities_neighborhoods/northwest/12481301.htm; TOWNSHIP OF MANALAPAN, N.J., MUN. CODE § 187-01 (2005), *available at* http://www.twp.manalapan.nj.us/agenda/ords/5_29_0824.pdf; Kirk Beldon Jackson, *Whitehall adopts sex offender law: Restrictions bar them from living in all but small part of township*, THE MORNING CALL, OCT. 18, 2005, *available at* http://www.mcall.com/news/local/all-b1-5whitehalloct18,0,6114534.story?coll=all-newslocal-hed.

will likely increase. If this happens, the innocent people whom these statutes are designed to protect – children – will be injured.

CONCLUSION

For the foregoing reasons, Petitioners' writ of certiorari should be granted.

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